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AIR MAIL SUBSIDY OF COMMERCIAL AVIATION

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INTRODUCTION

WITHOUT the continuing performance of the aviation services of the Federal Government, the commercial airlines of the United States could not operate for a single day.

The people of the United States through their Federal Government are very much engaged in the commercial aviation business. Not only have air mail contracts been a principal and indispensable source of revenue to private air carriers over the years since 1926, but the Federal Government has built, maintained, and operated with funds appropriated from general revenues the network of beacons, radio range stations, and other facilities which together make up the present vast system of aeronautical aids known as the Federal Airways. The Federal Government has provided directly the greater part of all funds invested in the construction of civil airports and has developed and maintained elaborate air weather forecasting services without which the present scheduled operations of our great modern air liners would not be possible. Most of the personnel required for air traffic control at our principal airports as well as the thousands of persons employed in the maintenance and operation of the Federal Airways and in the aeronautical weather services of the Weather Bureau are on the Federal payroll.

Up to the present time, no means has been devised whereby the Government can reasonably expect to recover directly any part of the amounts invested. Moreover, the current, steadily increasing costs to the Federal Government for the maintenance and operation of the Federal Airways, the Air Weather services, and similar Federal expenses incurred in the interest of commercial aviation are paid entirely from general tax revenues and no plan for recovering any part of

such expenses from the private carriers benefitted has as yet received really serious consideration in any quarter.

The principal reason for this state of affairs lies in the fact that, with the exception of a few years during the recent war, the earnings of the principal commercial air carriers have not been sufficient to support any repayments to the Government for the benefits described above. Indeed, but for the direct air mail payments to individual carriers, most, if not all of the principal carriers would have been unable to remain in business.

In spite of the fact that the commercial aviation industry in the United States is now generally regarded as "Big Business" within the accepted meaning of that term, the ability of the industry to compete profitably on equal terms with other forms of transportation has yet to be demonstrated.

Generally speaking, as will be noted more specifically in subsequent pages, the policy of Federal aid to aviation has been predicated on the assumption that once the industry has achieved a certain size and stability it will be able to sustain itself in more or less free competition with other forms of transportation. In this respect the policy is similar to that which has supported protective tariffs through the greater part of our national history.

Although it appears that the average cost per seat mile has been reduced somewhat through the use of larger aircraft, it is very doubtful whether the cost per seat mile can be brought into a truly competitive relationship with similar costs for other types of transportation.[1] It is very clear, on the other hand, that the use of larger planes has been a major factor in bringing about the present precarious situation in the industry, because the current demand for air transportation is insufficient to permit profitable utilization of the increased capacity.

Most current discussions of the earnings position of the certificated air carriers take account only of the air mail subsidy, and the discussions deal for the most part with need for higher mail pay and with the question of how much of the mail pay represents subsidy. Other forms of the subsidy to commercial aviation, which are considerably larger in gross value than the air mail subsidy, and which are steadily increasing in amount, rarely figure in these discussions. There is some prospect that the air mail subsidy may ultimately be unnecessary and that the certificated airlines as a group may become "profitable" in the current usage of that term as applied to commercial aviation. However, the prospect of their achieving an earning rate which would permit them to reimburse the Government for their use of facilities and services now provided without charge, and thereby achieving a status of true economic self-sufficiency, is quite another and much more difficult, matter.

[1] PUFFER, AIR TRANSPORTATION (Philadelphia: The Blakiston Company, 1941), pp. 23-25.

It is worthy of note in this connection that in no other major nation has air transportation been attempted on a competitive private enterprise basis. In nearly every other country the Government has buttressed its financial support of the industry with more or less direct control over commercial aviation policies and there has been no assumption that air transportation can or should become economically self-sufficient in free competition with other transportation systems.

Attitudes Toward Federal Aid

The attitude of the Congress with respect to Federal aid to air transportation has undergone a considerable metamorphosis since it first passed legislation to authorize the carrying of air mail on a contract basis. The first Air Mail Act, generally known as the Kelly Act, which became law on February 2, 1925, authorized the Postmaster General to contract with private operators for the carrying of air mail, provided that contract rates should not exceed 80 per cent of the postal revenues derived from mail carried by aircraft. Congress clearly expected that the air mail service should pay for itself.

In the earliest hearings on air mail legislation, representatives of the industry agreed with Government officials that there was no economic or other justification for subsidizing the commercial aviation industry.[2] During the years from 1926 through 1934, when many efforts were made to establish a basis on which commercial carriers could carry mail without subsidy benefits, the principal objective was to achieve a volume of air mail which it was believed would permit profitable operations without subsidy aid.

Early in 1930 the Postmaster General is reported to have told the air mail carriers that they were not entitled to a subsidy similar to that paid to ocean shipping companies, because they were not competing with foreign carriers. Moreover, he is said to have taken the position that air mail payments should *not* be used to compensate for losses incurred from passenger traffic.[3]

The Air Mail Act of 1934 specifically provided that air mail payments should not exceed air mail receipts after June 30, 1938. Although the Civil Aeronautics Act of 1938 makes no provision for the elimination of the subsidy, the Civil Aeronautics Board has proceeded on the assumption that private air mail carriers will some day achieve a basis of operation which will permit discontinuance of air mail subsidy payments.

The Board of Investigation and Research, in its report of September 18, 1944 to the Congress, specifically recommended that

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[2] U.S. Congress, House of Representatives, *Commercial Aviation—Air Mail Service*, Hearing before Committee on Post Offices and Post Roads, U.S. House of Representatives, 67th Cong., 2nd Sess., January 6, 1922 (Washington: Gov. Print. Off. 1922).

[3] David, The Economics of Air Mail Transportation (Washington: The Brookings Institution, 1934), pp. 88-99.

> "public policies should be directed toward the objective of placing domestic air transportation on a self-sustaining basis as soon as that may be practicable."[4]

The President's Air Policy Commission in its report of December 30, 1947 said:

> We consider that direct Government financial aid to commercial airlines is fully justified on grounds of national security and economic welfare. We believe the air transport system of this country can, with such aid now, become self-supporting in the future.[5]

It is the purpose of this study to trace the history and current trend of Federal Aid to domestic commercial air transportation, to compute estimates of the dollar value of the several forms of subsidy in recent years, to appraise the industry's prospects for achieving economic self-sufficiency within the foreseeable future, and hence to arrive at some judgment as to whether the Government should continue to base its aviation policies upon the expectation that Federal aid will some day be no longer necessary.

What Is a Subsidy?

Although the first Air Mail Act expressly provided that payments to carriers should not exceed four-fifths of the revenues derived from air mail, and although both the Congress and the carriers had agreed, on the record, at various times prior to 1934 that there was no valid basis or justification for the subsidy of air mail operations, nevertheless the trend of events moved inexorably in the direction of subsidy payments and with the exception of a few recent years, the carriers have had since February 1, 1928, the benefit of air mail payments which exceeded the air mail revenues.

It is clear that it would be improper to regard all of the air mail payments made to carriers as a subsidy because such a basis of determination would disregard the legitimate costs of the airlines in providing air mail services. Moreover, since there has been no consistent relationship between air mail postage rates and payments to the carriers, it is misleading to identify as a subsidy the excess of payments to the carriers over postal revenues, although the air mail "deficit" has been frequently used as a measure of the amount of the subsidy.[6]

In the opinion of some experts the true measure of the air mail subsidy is the excess of payments made to the carriers for the transportation of the air mail over that portion of the total operating costs of the carriers which is allocable to the performance of that service. This

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[4] Board of Investigation and Research, *Public Aids to Domestic Transportation*, p. 4.

[5] President's Air Policy Commission, Survival in the Air Age (Washington: Gov. Print. Off. 1948), p. 102.

[6] This is the measure applied by the Association of American Railroads in the report on *Air Transportation* submitted by the Sub-Committee on Air Transportation of the Railroad Committee for the Study of Transportation in 1947.

was the measure used by the Federal Coordinator of Transportation in a study of public aids to scheduled air transportation covering the fiscal years 1931-1938,[7] and the same measure was used, with some modifications in detail, by the Board of Investigation and Research which undertook a similar study for the years 1939-1941.[8]

The problem is not altogether solved, however, by the acceptance of a definition such as that adopted by these investigators, because of the difficulty of separating the portion of airline operating costs properly attributable to the transportation of air mail from those incurred in connection with the passenger and other services provided.

The Civil Aeronautics Board has not as yet perfected a means for differentiating such costs. In connection with its testimony before the House Appropriations Committee, in February 1946, the Board submitted a statement concerning mail rates which said in part:

> "No exact formula for allocating costs between the mail and non-mail services has been developed. . . . As more information becomes available for the measurement of traffic potentials in each particular category and reliable estimates of traffic by categories become feasible, it is contemplated that more specific procedure will be developed for the allocation of costs to the different types of traffic."[9]

Under the provisions of the Civil Aeronautics Act of 1938 the Civil Aeronautics Board is authorized to establish rates of compensation to air carriers for the transportation of mail on the basis of the cost of providing such *services* plus the *need* of the carrier for such additional revenue as may be necessary to enable him to continue in business. It is apparent from the foregoing quotation that the distinction made by the Board between *"need"* and *"service"* factors in any specific situation must be, to a considerable degree, an arbitrary distinction.

An Accepted Formula for Identifying Air Mail Subsidy

In view of this situation, the formula used by the Federal Coordinator of Transportation and the Board of Investigation and Research has been applied in this study to compute the amount and trend of the subsidy in air mail payments for the fiscal years 1938 through 1948.

This formula provides first for the isolation of operating costs which clearly are in no way attributable to carrying the mail. The Board of Investigation and Research identified specifically the salaries of the stewards and stewardesses, passenger supplies and expenses, traffic and advertising expenses, and the expense of consolidated airport ticket office operations.[10]

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[7] Federal Coordinator of Transportation, *Public Aids to Transportation* (Gov. Print. Off. 1940), pp. 129*ff*.

[8] Board of Investigation and Research, *Public Aids to Domestic Transportation*, p. 451.

[9] *Appropriation Bill for* 1947, p. 896.

[10] For the purpose of this paper the "Recurrent Report of Financial Data" prepared by the Civil Aeronautics Board has been used. This is a quarterly sum-

The second step in the formula used by the Board of Investigation and Research was the pro-rationing of the net joint operating costs remaining, between mail, passenger and other services on the basis of the ratio of the ton-miles of each type of service to the total ton-miles of revenue service performed. The net joint costs for the years 1938 through 1941 were thus computed by the Board of Investigation and Research, and the same procedure was applied to the years 1942-1948 in the preparation of this study.

Finally, the formula takes account of capital charges on the basis of a twelve per cent return on the invested capital, this rate having been established at the time as sufficient to attract new capital into the industry. The resulting charges for each year were apportioned on the basis of the ratio of participation in total ton-miles of service performed as described for step two. This phase of the formula has been applied here in the same way and at the same rate.

The amount of the subsidy for each year is, of course, the difference between the total sums paid to the air lines for carrying mail, and the costs of the carriers attributable to the performance of this service as computed by the formula. Although the Civil Aeronautics Board, as indicated above, has not officially adopted a formula for ascertaining the cost of carrying the air mail, the general method used by the Federal Co-ordinator and the Board of Investigation and Research has been used by the Board in many air mail rate cases.[11]

The Amount of the Air Mail Subsidy

The amount of the air mail subsidy as computed by the use of this formula for each of the fiscal years 1938 through 1948 inclusive is shown in Table I. Tables II and III present the detailed steps in the application of the formula, arranged in such a way that the data in each table is supported by data computed in the tables immediately following.

An allocation of total traffic, on a ton mile basis, among the several types of service offered provides the percentage used for computing the portion of net joint costs allocable to the air mail service.[12] In Table III the allowance for a return on capital assets is computed. The basis is the net depreciated value of the assets of the airlines. This usage conforms closely to that of the earlier studies mentioned above.

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mary of financial data filed with the Board by certificated carriers. These reports include under "Operating Expenses" three items, which include no costs for mail operations. These are "Passenger Service," "Traffic and Sales," and "Advertising and Publicity." Officials of the Economics Bureau of the Civil Aeronautics Board agreed informally with the selection of these items as being wholly free of any mail costs.

[11] Cf. *Eastern Air Lines, Mail Rates*, 3 CAB 733, 755 (1942); and *Pennsylvania Central Airlines, Mail Rates*, 4 CAB 22, 42 (1942).

[12] Passenger miles were converted to ton miles for the purpose of this computation by allowing 200 pounds for each passenger including his allowable baggage and adding thereto the ton miles of excess baggage carried. This is the same as the basis used by the Federal Coordinator of Transportation and the Board of Investigation and Research.

TABLE I—COMPUTATION OF AIR MAIL SUBSIDY FOR FISCAL YEARS 1938-1948

16 *Domestic Trunk Carriers* *

Fiscal Year	*Total Air Mail Payments* (a)	*Costs Allocable to Mail* (b)	*Subsidy Amount*	*Subsidy per cent*
1938	$ 14,747,945	$ 5,037,948	$ 9,709,997	65.8
1939	17,108,249	5,164,172	11,944,077	70.0
1940	19,470,635	4,994,965	14,475,670	74.3
1941	20,280,178	6,031,937	14,248,241	70.3
1942	23,812,440	6,998,188	16,814,252	70.6
1943	22,519,647	10,052,544	12,467,103	55.3
1944	28,031,183	14,951,940	13,079,243	46.7
1945	35,544,065	20,633,702	14,910,363	42.0
1946	27,407,433	18,069,349	9,338,084	34.1
1947	23,967,417	13,355,891	10,611,526	44.3
1948	37,678,090	15,969,246	21,708,844	57.6
Total	$270,567,282	$121,259,882	$149,307,400	
Average	24,597,026	11,073,626	13,573,400	55.2
		Feeder Carriers		
1946	$ 1,169,341	$ 198,576	$ 970,765	83.0
1947	3,805,989	216,929	3,589,060	94.3
1948	9,501,953	376,057	9,125,896	96.0

* Includes Territorial carriers up through fiscal year 1945. All data for years 1938-1941 inclusive were taken directly from the Report of the Board of Investigation and Research, House Document No. 159, 79th Congress, 1st Session, Gov. Print. Off. 1945. Table 76, Page 452.

(a) Data for years 1942-1945 inclusive were taken from the Annual Report of CAB, 1947, Gov. Print. Off. 1947, Appendix I, page 43. Data for 1946, 1947 and 1948 were supplied by Rates and Accounts Division of the CAB and take account of retro-active mail revenues applicable under CAB rate orders and "show-cause" orders issued through April 21, 1949.

(b) From Tables II and III.

TABLE II—COMPUTATION OF JOINT COSTS AND ALLOCATION OF JOINT COSTS TO MAIL SERVICE

16 *Domestic Trunk Carriers*

Fiscal Year	*Total Operating Expenses* (a)	*Direct Non-Mail Costs* (b)	*Net Joint Costs*	*% Alloc. to Mail* (c)	*Net Operating Cost of Mail Service*
1938	$ 41,667,608	$ 6,190,833	$ 35,476,875	13.0735	$ 4,637,692
1939	46,336,164	7,087,654	39,248,510	12.0202	4,741,027
1940	59,110,742	10,174,984	48,935,758	9.4426	4,577,850
1941	80,618,852	14,083,049	66,535,803	8.3652	5,538,853
1942	92,764,030	16,864,169	75,899,861	8.8660	6,729,281
1943	82,206,353	18,307,164	63,899,169	15.0622	9,624,621
1944	107,312,055	23,453,584	83,858,471	17.2847	14,494,685
1945	148,744,140	32,722,489	116,021,651	17.1587	19,907,807
1946	236,482,440	61,267,472	175,214,968	9.4755	16,602,494
1947	359,504,418	84,521,133	274,983,285	4.4504	12,237,856
1948	390,403,260	81,379,807	309,023,453	4.6994	14,522,248
			Feeder Carriers		
1946	$ 1,313,180	$ 61,322	$ 1,251,858	15.1011	$ 189,044
1947	4,946,511	572,984	4,373,527	4.5048	197,019
1948	12,196,236	1,578,100	10,618,136	3.3634	357,130

Note: All data for 1938-1941 inclusive were taken from Board of Investigation and Research, *op. cit.* Tables 1-4, Appendix AA, pp. 811-823.

(a) Data for 1942-45 were taken from CAB Annual Report for 1947, Appendix I, p. 43. Data for 1946, 1947, and 1948 are from CAB Report for 1948, Appendices G and H, pp. 50-53.

(b) Data for 1942-1948 represent the sum of following items from CAB Current Reports of Financial Data for Trunk Line Domestic Air Mail Carriers: "Passenger Service," "Traffic and Sales," "Advertising and Publicity."

(c) Based upon percentage of mail ton miles to total traffic on ton mile basis.

TABLE III—COMPUTATION OF CHARGES ALLOCABLE TO MAIL SERVICE

16 *Domestic Trunk Carriers*

Fiscal Year	*Net Operating Assets* (a)	*Allowance for Return on Assets* (b)	*% Allocable to Mail* (c)	*Net Capital Charge to Mail Service*	*Total Joint Operating & Capital Costs Allocable to Mail*
1938	$ 24,377,952	$ 2,925,353	13.0735	$ 400,256	$ 5,037,848
1939	27,169,488	3,260,337	12.0202	423,145	5,164,172
1940	35,447,382	4,253,685	9.4426	417,115	4,994,965
1941	49,265,094	5,911,812	8.3652	493,084	6,031,937
1942	25,275,144	3,033,017	8.8660	268,907	6,998,188
1943	23,675,321	2,841,039	15.0622	427,923	10,052,544
1944	22,045,248	2,645,430	17.2847	457,255	14,951,940
1945	35,253,982	4,230,478	17.1587	725,895	20,633,702
1946	129,004,188	15,480,503	9.4755	1,466,855	18,069,349
1947	209,350,948	25,122,114	4.4504	1,118,035	13,355,891
1948	256,592,753	30,791,130	4.6994	1,446,998	15,969,246
		Feeder Carriers			
1946	$ 526,001	$ 63,120	15.1011	$ 9,532	$ 198,576
1947	3,683,052	441,966	4.5048	19,910	216,929
1948	4,689,352	562,722	3.3634	18,927	376,057

Note: All data for years 1938-1941 inclusive were taken from Board of Investigation and Research, *op. cit.*, Tables 1-4, Appendix AA, pp. 811-823.

(a) Depreciated cost of total property and equipment. Data for 1942-45 are from CAB Annual Report for 1947, Appendix K, p. 46. Data for 1946, 1947, and 1948 were supplied by the Rates and Accounts Division of the CAB.

(b) Computed at 12%.

(c) Based upon percentage of mail ton miles to total traffic on ton mile basis.

For recent years this basis is substantially above the net worth of the airlines as published by the CAB, although it is somewhat less than the total invested capital, if long term debt is included.

To arrive at the capital charge allocable to air mail, the value of the net depreciated assets was multiplied by 12%, and the result was multiplied in turn by a percentage representing the portion of joint costs allocable to air mail.

In Table II the net joint costs of operation are computed by adding the allocable portions of joint operating expenses and capital charges for each year; and in Table I the amount of the air mail subsidy is derived by subtracting the total costs of the air carriers allocable to mail service for each year from the total amounts paid to the carriers in the same years for the performance of this service.[13]

For the years 1938 through 1948 the amount of the subsidy, as thus computed, ranged from a low of $9,338,084 in 1946, to a high of $21,708,844 in 1948. The average for these years is $13,573,400.

A comparison of the subsidy payments for these years with the subsidy payments for the years 1931 through 1937, Table IV, as computed by the Board of Investigation and Research indicates no trend toward the elimination of the subsidy. As a matter of fact, the average subsidy during the years 1938 through 1948 was nearly twice as great as that for the earlier period, which was only $7,956,240.

[13] The figures for the years 1938 through 1941 were taken directly from similar tables published by the Board of Investigation and Research. Figures for the years 1942 through 1948 were computed as a part of this study.

TABLE IV—AMOUNT OF SUBSIDY IN EARLIER YEARS (a)

Fiscal Year	*Excess of Air Mail Payments Over Cost*
1931	$ 5,219,090
1932	10,793,112
1933	13,609,946
1934	6,045,446
1935	3,622,015
1936	8,203,086
1937	8,200,988
Total	$55,693,683
Average	$ 7,956,240

(a) From Board of Investigation and Research, *op. cit.*, p. 449 (except for "total" and "average" figures).

It seems evident from these facts that the carriers have no basis for a claim on the Post Office Department for more than the amount necessary to reimburse them for the service rendered, and that any payments above this amount must be explained on some basis that does not relate to the postal services as such. Under the Civil Aeronautics Act of 1938 they are authorized, in accordance with the "need" clause, in such amounts as may be necessary to permit the individual carriers to remain in business. Such payments would not be necessary, even under the "need" clause, if revenues derived by the carriers from non-mail services were sufficient to cover the costs incurred by them in providing such other services.

It has been charged[14] that during the war years the volume of mail dispatched at air mail rates was so great that at times it greatly exceeded the available capacity of the certificated air carriers and that at such times some air mail was actually transported by the railroads, other common carriers, and by the Army Air Forces. To the extent that this was true the air mail profits of the Post Office Department are obviously inflated. The computation of the subsidy as presented in Table I would not be affected by such a situation, however, since this computation takes no account of total air mail revenues but includes only payments to air carriers for mail actually carried by them.

It is worthy of mention at this point that if payments to the carriers had been on a cost rather than a subsidy basis there would have been no postal deficit on air mail in any year since 1933.

The amount of the profit or loss to the Post Office Department from its air mail operations does not constitute a guide as to whether a subsidy exists. As a result of the very large volume of air mail during the war years 1943, 1944, and 1945 the Post Office Department realized substantial profits on its air mail operations. During these same years, however, the amount of the subsidy was consistently in excess of $12,000,000. One of the principle reasons for designating as a subsidy the excess of payments to the carriers over the cost of carrying the mail is the fact that the carriers themselves have no responsibility for and

[14] Association of American Railroads, *op. cit.*, p. 55.

incur no expenses in connection with promoting the use of air mail. Moreover, the air mail postage rates since 1938 have had no bearing on the rates at which carriers are reimbursed for carrying the mail.

The Post Office Department has experimented from time to time with different postage rates for air mail with a view to maximizing the return from the sale of air mail postage and thereby reducing the amount of the air mail deficit. Except insofar as different air mail postage rates have resulted in a variation in the *amount* of mail to be carried these experiments have had but little bearing on the payments to the carriers.

In the event the air mail costs and revenues of the Post Office Department were such that a profit was regularly earned by the Department on air mail business, the equitable adjustment would seem to be a reduction in air mail postage rates. Such an adjustment of air mail postage rates would have no bearing of course on the amount of subsidy in payments to the carriers, as that term is used here. So long as a profit is earned on air mail the users of that service are in effect subsidizing in some degree whatever other postal services may be operated at a deficit.

Big Five Mail Rate Proceeding

During 1947 three[15] of the Big Four airlines which had been carrying mail at the established "service" rate of 45 cents per ton-mile, and Northwest Airlines, which had been carrying mail at a service rate of 60 cents per ton-mile, petitioned the Civil Aeronautics Board for an upward revision of these rates. The petitions of TWA, United Air Lines, and Northwest Air Lines requested that the revision be made retroactively effective. All of the petitioning carriers, except Eastern, operated at substantial losses during the twelve months ending September 30, 1947, and Eastern's rate of profit for the nine months prior to that date had shown a decided decline under the rate for the twelve months ended December 31, 1946. Each sought relief under the so-called "need" clause of the Civil Aeronautics Act (Sec. 406 (b)).

The Board's March 29, 1948 Statement of Tentative Findings and Conclusions[16] is of interest because it established a new doctrine of "self-sufficiency" under which the five carriers are to be excluded from consideration under the "need" clause.

In the Board's opinion (p. 21 of the "Statement"),

> "It is apparent that if all other revenue of the carriers is sufficient to permit the carrier to fulfill the objectives under the Act

[15] Eastern Air Lines, TWA, and United Air Lines. American Air Lines, the other Big Four carrier, filed no petition.

[16] On March 29, 1948, the Civil Aeronautics Board issued a "Statement of Tentative Findings and Conclusions" concerning these petitions and issued orders to each of the petitioning carriers and the American Air Lines, ordering them to "show cause" as to why a new basis of air mail payments should not be established. American was included because the new basis was to be applied as the new "service" rate for all carriers formerly on a 45 cents per ton-mile basis. Dockets 2849 (TWA), 3014 (United), 3021 (Eastern), 3211 (Northwest), and 3309 (American).

> in respect to service other than the mail service, the need of the air carrier for mail compensation will then depend solely upon the costs of performing the mail service. . . . The status of self-sufficiency as contemplated by the Act may therefore be stated as representing that state in the carriers' economic development at which, under honest, economical, and efficient management, the volume and character of non-mail services required in the public interest may be fully supported by the revenues from such services under fair and reasonable rates to the public."

In the application of this principle, according to the statement, the Board will not be guided by the actual gains or losses of particular air line companies since these involve the exercise of business judgment over which the Board has no control and the consequences of which, including the results of mistaken judgment, ought to be borne by the companies themselves. In the words of the Board,

> "the real test of self-sufficiency is not confined to the attainment of a profitable level of operations but rather is related to the existence of a reasonable opportunity for a carrier to sustain itself at a profitable level without Government subsidies" (p. 25).

After a detailed analysis of the operations and earnings of these five companies at the "service" rates in effect since 1942 the Board concluded that each of them is now "self-sufficient" and therefore no longer entitled to consideration under the "need" clause in the establishment of mail rates. It also determined that the new schedule of payments would not be applied retroactively.

This new schedule[17] of payments is based on the principle that for the transportation of minimum loads, carriers are entitled to higher rates because of the heavy investment costs necessary to establish and maintain a mail service, and that as the volume of mail increases the

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[17] The schedule as proposed by the Board is as follows (p. 64 of "Statement"):

Mail Ton-miles per day	*Ton-mile Mail Rate Applicable to Each Block*
0— 2,500	75.0 cents
2,501—15,000	70.0 cents
5,001—10,000	65.0 cents
10,001—15,000	60.0 cents
15,001—20,000	55.0 cents
20,001—25,000	50.0 cents
25,001—30,000	45.0 cents
30,001—and over	40.0 cents

The practical effect of the new rate schedule is presented by the Board in the following table, which applies the schedule to estimated mail volume for the immediate future (p. 65):

	Mail Ton-Miles			*Effective*
Carrier	*Annual Total*	*Daily Average*	*Annual Mail Pay*	*Mail Rate Per Ton-Mile*
American	7,597,000	20,814	$4,757,000	62.62c
Eastern	3,808,000	10,433	2,604,000	68.38c
Northwest	2,323,000	6,364	1,647,000	70.90c
TWA	8,368,000	22,926	5,142,000	61.45c
United	9,620,000	26,356	5,743,000	39.70c

The Board estimated (in a press release issued April 7, 1948) that the effect of its new schedule would be to *increase* the air mail payments to these carriers by a total of $5,271,000.

rates of pay may be successively reduced because of the greater volume of service over which these and other overhead costs may be distributed.

There is no suggestion in the Board's statement in this case that the carriers concerned had suffered a loss on their air mail business at the old rate of 45 cents a ton-mile. The analysis of the financial and traffic data for the companies concerned for the twelve-month period ended September 30, 1947, in Table V discloses that air mail payments based on a rate of 45 cents a ton-mile were, with but one exception, more than adequate to cover all costs allocable to the mail service performed, as measured by the formula used here. The net total subsidy benefits for the group as a whole during this period amounted to $718,983.

In view of the Board's earlier discussion of the principle of self-sufficiency and its expressed determination not to consider in the mail rates for these carriers the cost of any non-mail services, it is somewhat paradoxical that the actual effect of the order is to provide additional subsidy benefits to the carriers concerned.

The Board points out, in support of its new schedule of service rates, that the ratio of air mail to the total traffic of the carriers has been steadily reduced because of the increase in passenger and other business, and that a straight pro-ration of costs between mail and non

TABLE V—SUBSIDY FACTORS IN OPERATING DATA FOR BIG FIVE CERTIFICATED AIR CARRIERS FOR 12 MONTHS ENDING SEPT. 30, 1947 (a)

Items	*American*	*Eastern*	*Northwest*	*TWA*	*United*
Air Mail Revenues	$ 3,297,000	$ 1,496,000	$ 1,264,000	$ 2,844,000	$ 3,952,000
Air Mail Costs	3,268,737	1,256,011	975,020	3,043,431	3,590,798
Subsidy or (deficit)	$ 28,263	$ 239,989	$ 288,980	$ (199,431)	$ 361,202
Expenses—Total	$ 81,118,000	$44,480,000	$22,074,000	$49,624,000	$ 69,879,000
Non Mail Items					
Passenger Service	6,217,000	3,748,000	1,480,000	3,920,000	6,672,000
Traffic & Sales	9,243,000	5,599,000	2,336,000	6,242,000	9,051,000
Adv. & Publ.	2,125,000	1,443,000	426,000	1,374,000	1,674,000
Total Non Mail	$ 17,585,000	$10,790,000	$ 4,242,000	$11,536,000	$ 17,397,000
Net Joint Costs	$ 63,533,000	$33,690,000	$17,832,000	$38,088,000	$ 52,482,000
% Allocable to Mail	4.4075	3.4288	5.0876	7.2370	6.1439
(A) Amount Allocable to Mail	$ 2,800,216	$ 1,155,163	$ 881,172	$ 2,756,429	$ 3,224,442
Investment	$ 88,584,000	$24,510,000	$15,372,000	$33,048,000	$ 49,691,000
Allocable to Mail	3,904,340	840,399	782,066	2,391,684	3,052,965
(B) Allowable Return (12%)	$ 468,521	$ 100,848	$ 93,848	$ 287,002	$ 366,356
Total Air Mail Costs (A & B)	$ 3,268,737	$ 1,256,011	$ 975,020	$ 3,043,431	$ 3,590,798
Traffic Data (ton miles)					
Passengers	144,811,100	88,955,100	36,711,200	72,380,800	118,723,200
Express	5,592,297	3,975,586	1,757,945	4,906,896	6,894,852
Freight	9,449,900	1,488,317	495,607	3,593,519	8,335,445
Air Mail	7,370,468	3,352,423	2,088,643	6,310,077	8,768,760
Total	167,223,765	97,771,426	41,053,395	87,191,292	142,722,257
% Air Mail	4.4075	3.4288	5.0876	7.2370	6.1439

(a) Note: Financial Data are from CAB "Release of Operating Revenue and Expense Statistics for the 12 months ended September 30, 1947; Domestic Air Carriers (Trunk Lines)." Traffic Data are from CAB "Release of Mileage and Traffic Statistics for the 12 months ended September 30, 1947; Domestic Air Carriers (Trunk Lines)."

mail services on the basis of this ratio is no longer a fair measure of the cost of the mail service, because it does not take account of certain minimum costs incidental to air mail service which should not be pro-rated.

As to these costs the Board states:

> "Although the costs directly incident to mail service cannot be accurately measured at this time, they are sufficiently sizeable as to require recognition in the mail rate."

It is difficult to appraise the validity of the Board's policy in designating the new schedule as a service schedule because of the Board's acknowledged inability to measure in dollar terms the factors which warrant service payments above the total amount of the allocated costs.[18]

As to the frequency of schedules required for air mail service the Postmaster General has found in nearly every case that the needs of the Post Office Department could be met by fewer schedules than those actually maintained by the carriers for the convenience of passengers;[19] although it is true that in some instances it has been necessary to schedule mail flights at hours when very few passengers desire to fly.

Finally it should be pointed out that the certificated air carriers as a group have always been paid at a higher rate per ton-mile of air mail than they have received in revenues for a corresponding amount of passenger business.

Commenting on the Board's new service rate as set forth in the Big Five case, the Postmaster General Stated:[20]

> "The uniform service rate formula which the Board proposes to apply in determining the mail compensation for the five carriers involved would provide an effective mail rate per ton-mile which exceeds the fair and reasonable rate necessary to compensate the carriers for the costs of carrying the mail plus a reasonable return upon the investment devoted to that service. The wide spread which exists between the Board's tentative finding of the estimated assigned costs of carrying the mail (which are not based on true costs) and the estimated effective rate under the proposed uniform service rate formula indicates a reliance upon the mail pay to support more than its just share of the costs. This could produce a 'need' rate rather than a 'service' rate."

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[18] It may be pointed out, however, that, generally speaking, planes on which mail is carried are built and operated primarily with a view to providing passenger transportation, and that the cost of providing the physical facilities required by passengers is probably greater than would be indicated by an allocation of joint costs on the ratio of ton-miles of passenger traffic to total traffic. Passengers require many cubic feet of air space for instance, in addition to the space they actually occupy. It is for their benefit that the air in the plane must be heated or cooled depending on the season. It is for their comfort and convenience that overstuffed seats are provided and that the interior of the plane is lighted. Much simpler and less expensive facilities are required for transporting the mail. Recent expenditures for larger, faster aircraft have not been made because of air mail service requirements but wholly because of a desire to improve passenger service.

[19] Civil Aeronautics Board, *Regulatory Standards and Policies Under the Civil Aeronautics Act*, an unpublished document prepared by Mr. Albert R. Beisel, Jr., in 1945 while a member of the General Counsel's Office (mimeographed), p. 33.

[20] U. S. Post Office Department, A Reply of the Postmaster General to the Civil Aeronautics Board's "Statement of Tentative Findings and Conclusions" (in the Big Five Case), June 7, 1948 (mimeographed), p. 2.

These facts provide some basis for questioning the Board's designation of the new schedule as "service" rates, and for the contention that the amount of the air mail subsidy has been substantially increased by air mail payments to the Big Five carriers at these new rates.[21]

Prospects for Eliminating the Air Mail Subsidy

It is true that until the last year or two the average rate of payment per ton-mile has declined sharply. However, the total of air mail payments to carriers has not declined during the last ten years but has actually increased by substantial amounts over a portion of the period and it is now considerably greater than at the beginning of the period.

There has been a good deal of discussion in aviation circles recently about a proposal that all first class mail be sent by air, at regular first class rates whenever it would expedite delivery.

The suggestion that subsidy payments can be eliminated by increasing the volume of mail to be carried indicates a failure to understand the circumstances that have made a subsidy necessary. As we have seen, for the certificated air carriers as a group, the rates of air mail pay have consistently provided income to the carriers substantially greater than the costs they have incurred in carrying the mail. Payments in excess of such costs would not have been necessary were it not for the fact that revenues from passenger transportation and other services offered by the carriers have failed to cover the costs incurred in providing such services.

It is true that an increase in the amount of air mail carried would probably reduce the portion of costs allocable to each ton-mile of traffic carried. It is also true, of course, that as the volume of mail increases the amount of subsidy in the payment for each ton-mile of air mail service may be reduced, and this is probably one of the principal reasons why it has been possible to reduce the rate of air mail payments to the carriers as the volume of air mail increased. So long as the revenue derived from non-mail services fails to cover the cost of such services, however, some form of subsidy benefits will apparently be necessary regardless of the amount of air mail which may be carried. Moreover, the aggregate amount of subsidy payments necessary under present policies[22] will always be governed by the extent of the losses incurred in the performance of other services, rather than by the volume of air mail carried.

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[21] It should be noted in this connection that by the establishment of uniform rates of mail pay, which provide for each of two or more carriers, the Civil Aeronautics Board has been more liberal than the Civil Aeronautics Act requires in authorizing payments under the need clause. For if the rates of mail pay are such that they meet the "need" of the least "profitable" carrier, then the same rates of pay will provide for the better carriers some amount greater than they actually require to enable them to continue the performance of air transportation services.

[22] The present arrangements concerning air mail payments have put the Post Office Department very much "in the middle." That Department is obliged to pay air mail carriers at rates established by the Civil Aeronautics Board. Ordinarily the Department has had no advance notice of the Board's decisions,

Total Costs of Air Transportation

It was noted at the beginning of this paper that the costs of commercial aviation to the Federal Government include not only the air mail subsidy but also the costs incident to the maintenance and operations of the Federal Airways, the Federal portion of airport construction costs, and the cost of air weather services.

In Table VI there is presented a combined profit and loss statement showing the net profit or loss for the combined system during the years 1944 through 1948 and indicating what the earnings position of the scheduled air carriers would have been if they had been obliged to meet the full cost of the combined operation. According to this table, the scheduled air carriers could have met the full cost of the combined operation during 1944 and 1945 and yet retained some margin of profit. Absorption of the total cost in 1946, however, woud have converted a profit into a loss and in 1947 it would have increased the amount of the loss from about $30,500,000 to more than $64,000,000. For 1948 the loss would have been increased from about $27,000,000 to more than $66,000,000.

The total estimated cost of the scheduled air carrier system for 1944 was $132,604,463, of which the Federal Government paid 19.07%. The total estimated cost for 1948 was $464,186,015, an increase of approxi-

Table VI—Scheduled Air Carriers Joint Profit and Loss Statement
(Showing federal and private participation in a joint undertaking to provide air transportation)

	1944	1945	1946	1947	1948
The Air Line Companies' *					
Non-Mail Rev.	$106,010,172	$156,320,249	$224,748,386	$316,775,341	$350,139,397
U.S. Mail Rev.	28,031,183	35,544,065	28,576,774	27,773,406	47,180,043
Total Revenues	$134,041,355	$191,864,314	$253,325,160	$344,548,747	$397,319,440
Operating Exp.	107,312,055	148,744,140	237,795,620	364,450,929	402,599,496
Oper. Profit †	$ 26,729,300	$ 43,120,174	$ 15,529,540	$(19,902,182)	$ (5,280,056)
Deduct:					
Air Mail Subsidy	13,079,243	14,910,363	9,338,084	10,611,526	21,708,844
Adj. Profit †	$ 13,650,057	$ 28,209,811	$ 6,191,456	$(30,513,708)	$(26,988,900)
Deduct: *Estimated expenses borne by Federal Government.*					
Federal Airways	9,692,689	10,303,891	20,224,292	26,716,627	32,531,212
Airport Const.	1,533,578	2,715,082	4,598,576	4,549,176	4,337,063
Weather Services	986,898	1,079,880	1,647,454	2,790,342	3,009,400
Total Estimated Federal Costs	$ 12,213,165	$ 14,098,853	$ 26,470,322	$ 34,056,145	$ 39,877,675
Joint Profit †	$ 1,436,892	$ 14,110,958	$(20,278,866)	$(64,569,853)	$(66,866,575)

* Note: Data for 1944 and 1945 are from CAB Annual Report for 1947, Appendix I, p. 43. Data for 1946, 1947, and 1948 represent totals of data for trunk and feeder carriers as published in CAB Annual Report for 1948, Appendices G and H, except that mail revenues have been adjusted for retroactive payments authorized through April 21, 1949. All data are on a fiscal year basis.

† Figures in parentheses are losses.

many of which are retroactive. As a result it has frequently been necessary for the Department to request supplemental appropriations from the Congress, and to explain and defend an action taken by another agency.

Post Office officials have urged that the Civil Aeronautics Board be given responsibility for justifying the need for appropriations to provide subsidy payments to the carriers. It is pointed out that such an arrangement concerning maritime mail services is now operating very satisfactorily.

mately 250% over 1944, of which the Federal Government paid an estimated total of 13.27% or $61,586,519. Accurate figures are not available for the years before 1944. Although the Federal Airways and the airports used by the scheduled carriers had in 1944 a very considerable latent capacity, the actual costs of Federal participation in our air transport system more than doubled during the five year period; this suggests that the continued growth of scheduled air carrier business will probably impose an increasing burden on the Federal taxpayer, instead of reducing it as aviation enthusiasts have heretofore confidently expected.

Analysis of Costs and Revenues

The costs and revenues incident to the air mail services of the carriers have been considered above. It is pertinent to give some consideration at this point to the cost-revenue relationships for other types of traffic.

The *revenues* derived from passenger, freight and express service are clearly separated in the published reports of the Civil Aeronautics Board. To arrive at separate *cost* figures for each of these types of traffic total joint costs were apportioned, as in the case of air mail, in accordance with the proportion of the ton-miles of each type of traffic to the total ton miles of transportation service provided. The profits and losses by types of traffic as thus computed are shown in Table VII.

TABLE VII—SUMMARY OF PROFITS AND LOSSES BY TYPES OF TRAFFIC
(Under Present Arrangements) *

	1944	1945	1946	1947	1948
Passenger Business	$ 9,858,176	$22,882,176	$ 602,236	$(36,718,562)	$(25,234,703)
Express Business	2,327,971	3,708,779	1,566,251	994	(2,959,211)
Freight Business	—	—	(25,148)	(2,716,831)	(12,210,435)
Misc. Revenue (a)	1,003,476	819,327	1,099,049	2,629,167	1,740,060
Non-Sched. Transp.	(a) 7,624	63,539	501,917	1,564,521	1,083,567
Net Income From Non-Mail Business	$13,197,247	$27,473,821	$ 3,744,305	$(35,240,711)	$(37,580,722)
Air Mail Profit (b)	13,536,498	15,636,258	11,785,236	15,338,531	32,300,665
Total Profit or Loss on Current Basis	$26,733,745	$43,110,079	$15,529,541	$(19,902,180)	$ (5,280,057)

* Note: Derived from revenues and expenses for 1944 and 1945 as reported in CAB Annual Report for 1947, Appendix V, p. 43, and for 1946, 1947, and 1948 as reported in Appendices G and H (pp. 50-53) of the CAB Annual Report for 1948. Total joint expense was allocated to several types of traffic on basis of the ratio of the ton miles of each type of traffic to the total ton miles of traffic.

(a) No expenses were charged against these items.

(b) Revenues less allocable portion of costs with no allowance for capital charges.

The results of such an analysis as applied to freight revenues and costs are rather startling for they show that on the basis of such a cost distribution the carriers lost in 1948 more than $12,000,000 on their freight business alone. See Table VIII.

The policies of the carriers and of the CAB with respect to freight rates present something of a conundrum when compared with their policies with respect to air mail rates. The average rates for the carry-

TABLE VIII—COMPUTATION OF PROFIT OR LOSS ON FREIGHT BUSINESS

Year		Net Joint Costs (a)	Costs Allocable to Freight Per cent (b)	Amount	Freight Revenues (c)	Profit or (Loss)
1946	(T)	$175,214,968	.9610	$ 1,683,816	$ 1,658,668	
	(F)	1,251,858	.....	.....	.....	
Total				$ 1,683,816	$ 1,658,668	$ (25,148)
1947	(T)	$274,983,285	3.2364	$ 8,899,559	$ 6,187,359	
	(F)	4,373,527	.1468	6,420	1,789	
Total				$ 8,905,979	$ 6,189,148	$ (2,716,831)
1948	(T)	$309,023,453	7.4506	$23,024,101	$11,015,497	
	(F)	10,618,136	2.2960	243,792	41,961	
				$23,267,893	$11,057,458	$(12,210,435)

(a) See Table II, Column 3 (T—Trunk Lines; F—Feeder Lines).
(b) Based upon ratio of ton miles of freight to total ton miles of traffic.
(c) CAB Annual Report for 1948, Appendices G and H, pp. 50-53. Freight data for Feeder Lines for 1946 was not separately reported.

ing of air mail, as established by the Board in the Big Five case in the spring of 1948, were in excess of *sixty cents* a ton mile. These rates have been increased by subsequent actions of the Board. During the same year the Board established a minimum rate of only *sixteen cents* a ton mile for freight shipments of 1,000 ton miles or less and a rate of only *thirteen cents* a ton mile for shipments of air freight in excess of 1,000 ton miles.[23] The discrepancy between these two rate schedules becomes even more surprising when it is noted that the Post Office department performs all important handling of air mail on the ground before and after air mail flights, whereas the carriers are obliged to provide the necessary ground facilities and services for the handling of their air-freight business. It appears, therefore, that the encouragement of air freight business on the part of the certificated carriers is resulting in a need for larger subsidy payments than would otherwise be the case.

Profits and losses attributable to passenger business fluctuated widely during the years 1941 through 1948. This type of business earned a high of $22,882,176 during the fiscal year 1945 when the war was making its maximum demands on all types of passenger transportation facilities. It sustained a loss of $36,718,562 in 1947, and a loss of $25,234,703 in 1948.

Passenger traffic accounts for the bulk of the business of the scheduled air carriers. As a proportion of the total ton-miles of pay load carried, it ranged during the period under consideration from a low of 76.24% to a high of 88.56%. It is evident from this fact and in view of the earnings record with respect to air mail and express that it is the passenger business which has given rise to the need for financial and other assistance from the Federal Government.

If the scheduled air carriers had been obliged to absorb their proportionate share of the cost of facilities and services provided at Government expense, and if there had been no subsidy in the air mail payments, the passenger business would have earned no profits during

[23] Civil Aeronautics Board, *Annual Report*, 1948, p. 19.

the years 1944-1948 and the losses in 1947 and 1948 would have been $81,386,233 and $86,821,222 respectively. It is evident that air line passengers paid only a fraction of the cost of the services they purchased with their tickets.

The Economics of Air Transportation

"There are two cardinal principles in successful air transportation: keep your planes in the air and keep them full."[24] Conformance with these principles is essentially a problem of correlating the number, size, and utilization of aircraft with the number of persons who desire to fly, in such a way as to maximize the utilization of aircraft capacity.

It is not possible, of course, in the maintenance of an air transportation business on a common carrier basis to utilize all available capacity on all flights scheduled; and it is not possible, without turning passengers away, to ensure that each passenger who leaves at an intermediate point will be replaced at that point. In addition, there are certain weather and seasonal factors which cannot be exactly compensated for in the amount of passenger space made available. Characteristically, therefore, air carriers must follow the practice of providing on scheduled flights more passenger carrying facilities than will ordinarily be required.

Mr. Hugh Knowlton estimates that the maximum load factor which an air carrier can ordinarily obtain is between 70 and 75 per cent.[25] Professor Claude Puffer is of the opinion that an air line cannot ordinarily expect to maintain an annual load factor much in excess of 65 per cent.[26] The actual load factor of the scheduled air carriers, as a group, reached a high of 89.50 per cent in 1944. This was during the war, at a time when the demand for air travel was so consistently in excess of capacity that the Government was obliged to establish a system of air travel priorities in order to ensure that persons traveling on business connected with the war could be assured of seats on airplanes.

The break-even point characteristically fluctuates inversely with the spread between the average fare and the average cost per available seat mile. Thus in 1941, when the spread was $0.0191, the break-even point was only 64.57 per cent. Unfortunately, the average load factor for that year was considerably less so that a loss was sustained on passenger traffic. In 1944, on the other hand, when the spread was only $0.0094, the break-even point was 81.96 per cent. Because the actual load factor was 89.50, a worthwhile profit was earned on passenger business that year. In 1946 when the spread was only $0.0064 the break-even point was the highest for the period, being 86.45 per cent.

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[24] Knowlton, Air Transportation in the United States; Its Growth As A Business (Chicago: University of Chicago Press, 1941), p. 48.

[25] *Ibid.*, p. 49.

[26] Puffer, *op. cit.*, p. 48. Note: The term "capacity factor" might well be used to designate the maximum possible load factor.

With a load factor of 85.92 per cent, a small loss was sustained on seats sold that year, but this was more than offset by the revenues from excess baggage.

If the airlines had been obliged to absorb the costs covered by the subsidy during the years 1944 through 1948, the break-even point, other factors remaining unchanged, would have been consistently higher than any actual load factor ever achieved by the scheduled air carriers, as a group, over the course of a full year's operations. As a matter of fact, during the fiscal years 1944 and 1948, the air carriers could not have covered their costs, at the fares then in effect, even if they had consistently operated their planes at 100 per cent of passenger capacity.

The load factor of 70.99 per cent for the fiscal year 1947 represents, according to the authorities cited above, a reasonable expectancy under normal operating circumstances. This load factor resulted from an actual 6,224,356,000 passenger miles for that year. Presuming that the operating costs were held to a minimum and that the average fare could have been raised to any necessary point without loss of business, it would have been necessary to charge a rate of $0.0610 per passenger mile in order to obtain total revenues sufficient to cover the full costs of operation including the costs covered by the Federal subsidy. Such a rate of fare would have provided a spread of $0.0181 over the total cost per available seat mile. It is exceedingly doubtful, however, whether any such fare could have been charged without a serious loss of passenger business.

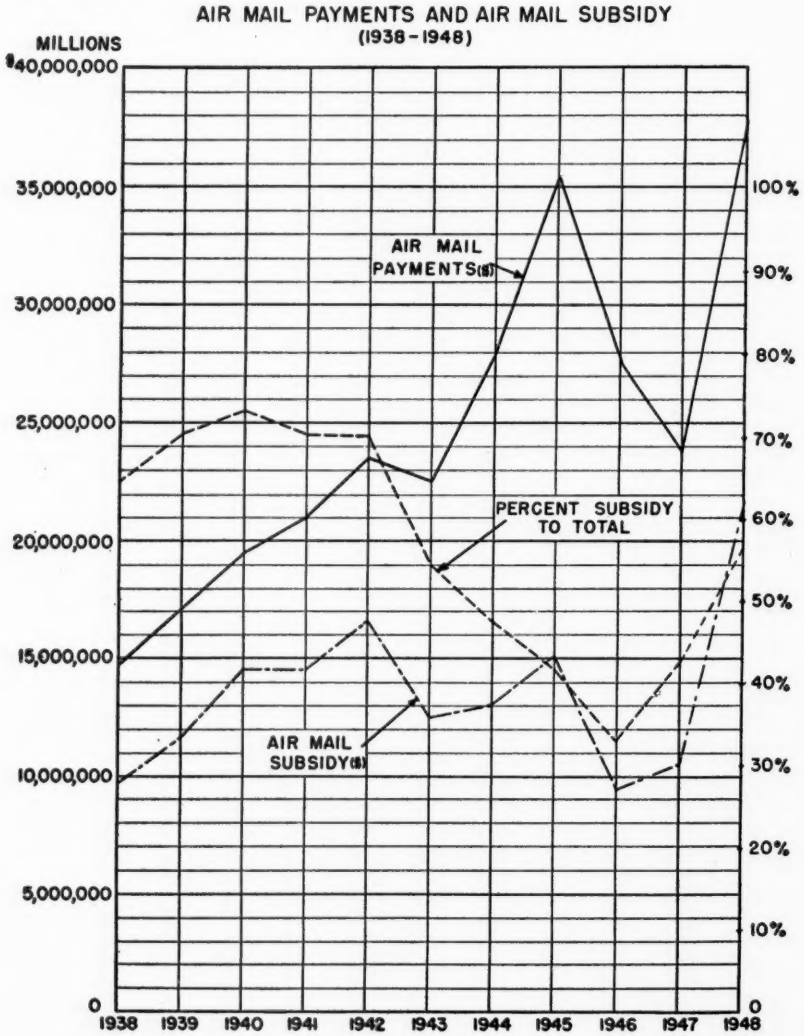
The Quest for Volume

The development of the commercial aviation industry has been predicated on the assumption that increased volume will result in lower unit costs. Federal agencies responsible for the Government's policies toward aviation have supported the industry in that point of view.

There is a good deal of evidence to indicate that this assumption has been warranted over the years since 1926. The increase in the number of passengers carried and the reduction in plane-mile costs and in passenger fares since that year has been truly remarkable.[27] If these trends were to continue, they might culminate in an ultimate relationship between fares and operating costs which would thereafter assure the profitable performance of air passenger business. There are certain facts, however, which suggest that the prospect of further expansion in the demand for air travel is now subject to some rather definite limitations.

[27] A substantial portion of the decrease in costs achieved by the airlines has been made possible by the improvements in aircraft design. The extent to which planes may be made still more efficient is a question for aeronautical engineers. Cost data for recent years suggest, however, that the rate of improvement may be levelling off since the introduction of the large new post war planes.

The airlines themselves appear to have undertaken their post war expansion program with an optimism which took too little account of the absolute limits of the demand for travel at rates they could reasonably expect to charge; for, in May, 1946, the estimated annual capacity of planes owned and on order by the certificated air carriers was 20.9 billion passenger miles. Utilization of all this capacity would require passenger traffic at more than *three* times the rate actually achieved in 1946. The improbability of such an achievement is emphasized by the fact that such a volume of traffic would equal or exceed the revenue passenger miles in railroad coaches *and* Pullman cars for any of the pre-war years from 1937 to 1940.[28]



One of the principal factors detracting from current use of air travel is the failure to maintain regular schedules. This failure is primarily a consequence of bad weather conditions. There is some prospect that the technical problems of all-weather traffic control will be solved and that ultimately scheduled air carriers may hope to maintain service with a regularity approaching that of the railroads. This prospect lies in the $1,113,000,000 Radio Technical Commission for Aeronautics SC-31 Program.

Unfortunately, the cost involved in this project is so very great as to make it exceedingly improbable that the scheduled air carriers, even with a great increase in volume could earn enough to enable them to pay their proportionate share of the installation costs. Moreover, the annual cost of operating the Federal Airways will be so greatly increased by this program that even if the installation costs were written off as an unrecoverable item, it is doubtful whether the proportionate share of the annual operating costs could be carried by the airlines.

In other words, the technical means for establishing regularity of airline operations, and for greatly improving the margin of safety in air travel may be available within a comparatively short span of years. But the proposal to carry out such a plan seems uneconomic because it will probably cost more than it can ever earn. It must be justified, therefore, primarily on the basis of its potential contribution to our national defense.

The circumstance which makes the RTCA proposal uneconomic, is the fact that, barring another war or a very drastic change in our national habits, the maximum number of potential travelers, whether by air or by rail, is definitely limited, and the combined capacity of rail and air carriers seems to be rapidly approaching that limit.

Assuming that the RTCA program were to be adopted, and that adequate safety and regularity of airline operations were established, the airlines could scarcely hope to do better than double their present rate of operations. It seems exceedingly unlikely, in view of the information now available, that such a volume of business would provide revenue sufficient to cover their costs plus the greatly increased costs, to the Federal Government incidental to the operation of the Federal Airways under the RTCA plan.

The railroads contend, and some corroborating evidence has been presented here, that the rapid development of air travel, in competition with first class rail travel has been possible only because of the very substantial assistance afforded the aviation industry by the Federal Government.

The essential obstacle that confronts the air carriers in their efforts to compete with other types of transportation is that the airplane is a very expensive vehicle to operate. Unlike most forms of transportation, it must not only generate sufficient power to pull itself forward, but

[28] American Association of Railroads, *op. cit.*, p. 77.

must also generate sufficient power to maintain itself in the air over sustained periods of time.

It seems clear that the prospect for the economic self-sufficiency of scheduled air carriers, under the present policies of the Federal Government, the present and probable future demand for air travel, and the continued utilization of the present, practicable, flight techniques, is very dim indeed. It seems probable that the certificated air carriers will continue to require Federal aids in one form or another in the foreseeable future and that the growth of commercial aviation will probably require greater, instead of less, expenditures on the part of the Federal Government if it is to continue its present role in the joint enterprise of providing commercial air transportation.

If this is true, it is a matter of very considerable importance, for it negates one of the major promises on which Federal aids to aviation have heretofore been justified. Federal assistance to aviation has been viewed as aid to a new and expanding industry which would some day become economically self-sufficient, and earn enough revenues so that the Government could recover some portion if not all of the expenditures it has made with funds derived from general taxation. If the foregoing analysis is sound, it means that further expansion of passenger business by scheduled air carriers no longer offers the prospect of ultimate economic self-sufficiency, but will probably result in an increasing demand for subsidies, in one form or another, to be paid by the Federal Government.

Who Benefits?

There remains for consideration a brief analysis of the question: who or what has been the beneficiary of the air mail subsidies paid?

It is obvious that the subsidies have made it possible for the commercial air line companies to stay in business and to develop the arts of aerial navigation. The owners and operators of air lines have thus benefitted directly from such payments.

It has been pointed out that since its inception the delivery of mail to persons in rural areas, the so-called *rural free delivery* service, has cost the Government far in excess of the postal revenues earned on this class of mail. Yet there has been no complaint about the subsidy of the rural mail carriers, many of whom in recent years have carried such mail on a contract basis. As a matter of fact, most people would agree that in this case it is not the rural mail carrier but the farmer whose operations are subsidized by this extra service.

The situations are not altogether parallel, since presumably the payments to the rural carriers approximate the cost of the service rendered, whereas we have shown that payments to air carriers have been substantially in excess of the true costs incurred by them in carrying the air mail.

This discrepancy suggests the possibility of yet another beneficiary of the air mail subsidy, viz. the air line passenger. To the extent that

the air mail subsidies have been applied against losses incurred in the performance of passenger carrying services, the passengers themselves have benefited, since without the aid of the air mail subsidy the carriers would presumably have been obliged to charge a higher passenger fare; in which event of course, some of the air passengers might have elected to travel by other means.

Conclusion

Having reviewed the history of the Federal subsidy to commercial aviation, and having noted the nature and trend of the several types of subsidy benefits, it is appropriate to consider what conclusions may be drawn from this study. The more important of these may be enumerated as follows:

(1) It seems evident that the facts of the situation, as disclosed and analyzed in this study, offer little hope or encouragement to those who still expect that commercial air transportation can become truly self-supporting within the framework of existing legislation, administrative policies, and flight techniques.

(2) It seems probable that further expansion of the commercial air transport industry, under present circumstances, will result in *greater* rather than less subsidy benefits in the years ahead. This conclusion is based primarily on the fact that the expansion will almost surely require increased direct expenditures on the part of the Government for the improvement, maintenance, and operation of the Federal Airways, for the improvement of air terminal facilities, and for expanded weather services.

(3) There is no present prospect for the elimination of the air mail subsidy. The average amount of this subsidy as herein computed for the years 1938 through 1948 was nearly twice the average amount of the subsidy for the years 1931 through 1937; in spite of the fact that the volume of all types of business carried by the certificated carriers increased several fold during the latter period. It should be emphasized here that the need for this subsidy will continue so long as non-mail services of the carriers fail to pay their own way, and that increasing the volume of air mail to be carried offers no solution to the problem. Special consideration should be given in the immediate future to the influence of the increasing volume of air freight on the carriers' need for air mail subsidy payments.

(4) Although representatives of the industry have talked recently in terms of the "restoration" of a "sound financial situation," there has never been a time, with the exception of the abnormal years of peak wartime traffic, when the certificated air carriers, as a group, could have paid their own way, including their fair proportion of the cost of the Federal Airways, airports, and weather services.

(5) The foregoing analysis suggests that Government and industry officials may have been unwise in attempting the development of a "mass" air transportation system. The costs inherent in the operation of aircraft, and the limited need for transportation at very high speeds appear to preclude bona fide competition with railroads and buses for large volumes of traffic.

It is fair to ask on what grounds it is held that a subsidy to the domestic air commerce industry ought not to be continued indefinitely. In reply to such a question it is pertinent to list some of the more important considerations which have justified Federal subsidies to private enterprise. Among the more important of these are the following:

(1) The need to equalize differences in costs for companies competing in international trade; as in the case of the merchant marine, and the "overseas" air carriers.

(2) The general public acceptance of the need for assistance to "infant" industries which promise great benefits to the public at large. The land grants to the railroads were warranted largely on this basis.

(3) The need to offer some inducement for "voluntary" cooperation in crop control programs which benefit not only millions of farmers, but which also result, it is argued, in benefits to consumers through the stabilization of food prices.

(4) The need in times of national emergency to insure maximum utilization of all capacity for the production of war goods without permitting prices in general to rise to a level sufficient to cover the costs of marginal producers.

The subsidy to commercial aviation in its "infancy" has been justified and accepted under the second of the considerations listed above. Once it was evident that the industry in its early stages was not able to support itself, this consideration became the dominant factor in the continuation of various Federal aids. Such an argument can hardly be sustained, however, once the industry has outgrown its "infancy," and the data presented above indicate that that time has now arrived.

The potential military value of our commercial air transport system affords a special basis for providing Federal aid, and some such aid would probably be continued on the ground of military necessity even though the expectation that the airlines could become economically self sufficient were abandoned. This fact, however, should not preclude a reconsideration of existing Government policies with a view to finding some means for eliminating the subsidy, if that is possible, or for ensuring that subsidy benefits will be kept as small as possible in the general interests of economy.

Suggested Steps Toward a Solution

This study has been directed primarily toward a more adequate understanding of the problems presented by the present subsidy of commercial aviation. It has not been directed toward the development of solutions to these problems. Nevertheless, the data that have been considered here afford some basis for *suggestions* as to steps that might be taken to improve the situation.

(1) The first, and most obvious, of the suggestions that can be made is that an investigation of the type attempted here should be undertaken by some group having the resources and authority of the Federal Government.

Such a study might be specifically authorized by the Congress or it might be undertaken by the Secretary of Commerce pursuant to his general responsibilities for the welfare of the aviation industry. Although the Civil Aeronautics Board and the Civil Aeronautics Administration could contribute much to such an investigation, they are so closely identified with the present arrangements that more objective results would probably be obtained if responsibility for the project were placed elsewhere.

Similar studies were made by the Federal Coordinator of Transportation for the years 1934 through 1938, and by the Board of Investigation and Research for the years 1938 through 1941. The work begun by these groups needs to be brought up to date to take account of the changes brought about by the war and by the industry's achievement of technological maturity. Moreover, the aviation aspects of these earlier studies were somewhat obscured by the fact that the studies were concerned with subsidies to all forms of transportation.

(2) Pending the completion of such an investigation, which would presumably include a consideration of the possible bases for the allocation of air carrier expenses between air mail and other traffic, it is suggested that the formula developed by the Federal Coordinator of Transportation should be adopted by the Civil Aeronautics Board, and that the Board should include in its statistical reports information as to the amount of subsidy in air mail payments as thus computed.

Publication of such data on a current basis would provoke lively discussion among the carriers themselves as well as among the Federal agencies concerned and would undoubtedly result in many suggestions for improvement in the formula.

(3) It is suggested that the Secretary of Commerce, in collaboration with the Secretary of National Defense, should establish a basis for the allocation of the expenses of the Federal Airways, the air weather services, and the Federal portion of airport construction costs, among the scheduled air carriers, other private flyers, and the military air forces; and that the Secretary of Commerce should develop specific proposals for making an appropriate recovery of Federal expenses from the scheduled air carriers and other private flyers who benefit from the use of these facilities.

The Civil Aeronautics Administration took some steps in this direction in its study of 1946 on "Charging for Federal Airways." The

investigation should be extended and pressed forward, however, by persons working at a higher more disinterested level than can probably be achieved within the CAA itself.

(4) If it is desired to put the industry on a self-sufficiency basis Section 406(b) of the Civil Aeronautics Act should be revised in such a way as to eliminate any Federal guarantee of the continued solvency of certificated carriers.

The Civil Aeronautics Act presumes the operation of commercial aviation by private companies under limited competition. In an economy based on private enterprise and initiative, it is a part of the function of competition in any market to eliminate so much of the supply as cannot be made available at prices prevailing in that market. By this means, the total number of suppliers at any one time is roughly proportional to that which the demand will support. The failure of certain firms is quite as important in maintaining this balanced relationship as the success of others.

There is undoubtedly a limited demand for air transportation at a price sufficiently high to cover all costs of operation. If it is our policy for commercial aviation to continue on a private enterprise basis then the processes of competition should be permitted to operate in such a way that the present excess in the facilities offered would be eliminated by the failure of the weaker firms. If such a policy seems harsh it should be remembered that it is no different from that which prevails in nearly every other industry.

So long as Section 406 (b) stands in its present form, there is reason to believe that capacity will always exceed demand, and that the Federal Government will always be obliged to cover the losses arising from this fact. As one transportation expert phrased it some months ago, "The competition we are subsidizing in the aviation industry is competition for subsidies!"

If a policy other than competitive private enterprise were adopted for our domestic air transport system, the guarantee afforded by Section 406 (b) would no longer be necessary.

(5) It is suggested that so long as there is no significant margin of profit in the air transportation business, the policy of certifying competitive carriers over the same routes should be discontinued.

On this point the industry's criticism of the Civil Aeronautics Board appears to be sound. Granting that carriers have inaugurated more schedules than they should have, as contended by the CAB, it seems probable that they have done so, in part, in order to prevent loss of business to other carriers. The result, of course, has been lower load factors and heavier losses for all carriers concerned.

(6) If an official study similar to that attempted here, and the experience of the next two or three years confirms the indications of this report that commercial aviation on a large scale may be inherently unprofitable under the present competitive private enterprise basis, it is suggested that consideration should be given to the following alternatives:

(a) The designation or organization of a single private carrier for each route pattern, with a consolidation of all existing facilities un-

der the control of that carrier; with the provision that that single carrier would operate as a true public utility, under the close supervision of a Federal regulatory agency, and that the schedule of rates for services to the public should be subject to review and approval by such agency. (b) The nationalization of the air transport industry.

The first alternative is supported by the probability that a single carrier, relieved of the necessity for meeting competition, could establish its schedules between the cities served on the basis of the total demand for such transportation, and could offer such capacity on each schedule as would maximize its average load factor. It seems possible, that on such a basis, a private carrier might cover all costs and earn a fair return on its invested capital.

As to the second alternative, it may be pointed out that only in the United States has air transportation on a large scale been undertaken on a private enterprise, competitive basis. In every other country of size or importance, air transport service is either provided directly by the government, or the government holds a substantial and controlling interest in companies in which there is some private participation. In either case there is no attempt to establish competition among companies chartered or operated by the same national government.

Such an alternative would probably be more palatable here, in the event it is decided that the aviation industry should be built and maintained on the basis of military necessity rather than on the basis of economic demand for air transportation.

The Policy Behind the Policies

In spite of the industry's criticism of its treatment at the hands of the Federal Government, impartial observers would surely agree that the civil aviation industry in the United States enjoys today a uniquely favorable relationship with the Federal Government.

The scheduled air carrier industry has grown at a rapid rate during the war and post-war years. A comparison of the capacity it is now equipped to offer with the potential demand for air travel suggests that opportunities for further growth in the near future are definitely limited. It can scarcely be regarded any longer as an "infant" industry.

Yet the carriers have found it necessary to ask for substantial increases in the rates at which they are paid for carrying the mail. Moreover, appropriations from the general revenues for the improvement and operation of commercial air navigation facilities are steadily increasing, with no prospect that any portion of these costs can ever be recovered from the air line operators.

These facts suggest that the time is not far off, if it has not already arrived, when the Federal Government should reappraise the premises on which it has encouraged and sustained the development of commercial aviation, that the policy behind the policies should be revised, and that some means should be sought whereby the operation of essential air transportation services can be performed in a more equitable, more economical way.

NATIONAL POLICY TOWARD COMMERCIAL AVIATION — SOME BASIC PROBLEMS

By Lucile Sheppard Keyes

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IT is possible that at least one desirable result may come out of the financial difficulties recently confronting the nation's scheduled airlines. These difficulties may bring to the attention of the public, and of Congress, some fundamental policy problems the solution of which is necessary to the development of a rational governmental policy toward commercial air transport. A great deal of discussion, of varying degrees of disinterestedness, has already been provoked by these difficulties, but there is danger that this discussion may either cease, as a result of the remedial action already taken by the Civil Aeronautics Board, or continue to be directed to what are essentially temporary and superficial issues — such as who was to blame for the "crisis" and what immediate remedies should have been applied.

Neither of these questions necessarily involves problems of basic policy, and both can be answered without their solution.

The more fundamental problems which may be raised in connection with the airline "crisis" have existed at least since the formulation of the Civil Aeronautics Act, and will persist even though the losses of the airlines have disappeared. In this article, there will be briefly considered three basic problems which are brought into relief by the recent airline difficulties: (1) the problem of the extent to which the Government should support financially the operations of the scheduled airlines; (2) the problem of ultimate responsibility for the profitable operation of the scheduled airlines at any given level of support; and (3) the problem of the practical implications and general desirability of the regime of protective economic regulation embodied in the Civil Aeronautics Act.

The Extent of Government Support of the Airlines

The extent to which the Federal Government is justified in contributing to the financial support of the scheduled airlines can be determined only on the basis of a calculation of the extent to which the national need for their services exceeds or deviates from the amount or

character of such service which can be maintained by current demand (there being included here, of course, the legitimate demands of the Post Office). Thus it is evident that some definition of national requirements is a necessary starting-point for the development of a rational support program. The complete lack of such a definition is the root of much confusion with regard to the treatment of recent carrier losses as well as with regard to long-range Government action.

The Civil Aeronautics Act itself provides no definition of the nation's needs for air transport from the point of view of the national defense, the postal service, or commerce. Indeed, the framers of the Act were seemingly little if at all concerned with this all-important question. In retrospect, it appears that they were primarily interested in devising a means whereby the mail carriers, then as now in financial straits, could be rescued from their plight and protected from such embarrassment in the future. Although it cannot be doubted that this immediate objective was by some, at least, conceived as directly related to – indeed, vaguely identified with – the promotion of an air transport industry in accordance with national need, the fact remains that there was (and is) no necessary equivalence between the amount and type of air transportation provided by the scheduled carriers and that which an independent consideration of the nation's needs would prove to be required. In the absence of such an independent consideration, the program of Government support embodied in the Act was left without adequate orientation.

It was obviously not up to the Act's administrators to develop their own *autonomous* notions of the air transport requirements of the defense, mails and commerce of the United States;[1] at all events, they did not do so. Thus the administration of the support program became a matter of carrying into effect so far as possible the intent of Congress which the words of the Act did little to reveal. Accordingly, mail rates on existing routes were set so as to enable the carriers profitably to continue service at the then existing level. Since the framers of the Act apparently expected that aid would be given to operations on new routes as well as to those on routes already established, but failed to provide a specific guide for the selection of such new routes, the Board adopted the most logical possible extension of the general standard for support *in effect* accepted by the legislators. They had evidently endorsed support of existing scheduled air services to the extent required to maintain them at a profit; it was therefore only reasonable to suppose that they would endorse the support of new routes which could be profitably operated at rates of mail pay not too far out of line with those generally required by existing services.

[1] For an illuminating discussion by the Board of its own limited conception of its primary task, see the Letter from the Chairman of the Civil Aeronautics Board in further response to Senate Resolution No. 228, *Senate Document No.* 206, *Part* 2, 77th Cong., 2d Sess., September 2, 1942.

The Board's own conception of this standard is indicated by the following statement in an early route decision:

> "It is our belief that unless exceptional circumstances, such as the particular importance of a route from the standpoint of the national defense, exist in a given case, this relationship [*i. e.*, the relationship between costs and commercial revenues] should not initially impose upon the Government an unduly large proportion of the total operating cost. Conditions surrounding the operation of any service receiving a certificate should also be such as to justify an anticipation that commercial revenues will show a continuing tendency to increase, with a consequent progressive decrease in the degree of the carrier's dependence on the Government." [2]

In view of the fact that the Board itself has never vouchsafed any general definition of what would constitute an "unduly large proportion" of costs, and in the light of the decisions actually made in new route cases, it appears that the criterion employed by the Board led in general to the certification of such routes as were anticipated to require a rate of mail payment of the same general order of magnitude as those required on the grandfather routes, and to show promise of eventual financial self-sufficiency.[3] The latter requirement is perhaps not so clearly related as the former to the apparent intent of the framers of the Act; nevertheless, it reflects a not unreasonable inference from the Congressional mandate to promote "sound economic conditions" in air transport. Recognizing that the legislators had been primarily interested in extending a helping hand to the mail carriers, rather than in assuring the maintenance of a certain volume or type of air transport conceived to be required by national policy, the Board evidently concluded that the program of support was essentially a temporary expedi-

[2] *Northwest Airlines, Inc., Certificate of Public Convenience and Necessity (Duluth-Twin Cities Operation)*, 1 CAA 573, 579 (1940).

[3] The actual result of the Board's policy is indicated by the following table, which shows, for domestic air mail service, a considerable increase in miles of route and revenue mail miles flown accompanied by a decrease in the cost per revenue mail mile to the Post Office Department, notwithstanding the substantial increase in the total cost of the service to the Department. (Cost figures for the latter part of the period covered are subject to substantial upward readjustment as a result of retroactive mail pay orders by the Board.)

Fiscal year	Miles of air mail routes	Revenue mail miles flown (millions)	Cost of Service[a] (millions of dollars)	Average cost per revenue mail mile flown (cents)
1939	37,080	52.1	17.0	32.6
1940	37,943	59.2	19.4	32.8
1941	43,411	75.7	20.7	27.3
1942	44,623	89.3	23.5	26.3
1943	45,304	89.0	23.3	26.2
1944	49,482	107.7	28.4	26.4
1945	56,849	166.6	35.5	21.3
1946	57,377	221.7	26.8	12.1
1947	102,454	314.5[b]	21.7[b]	6.9
1948	130,093	321.7[b]	35.2[b]	10.9

[a] Does not include any amount for increased rates on air mail routes pending before the Civil Aeronautics Board.

[b] Subject to final adjustment.

Source: *Annual Report* of the Postmaster General, 1948, p. 119.

ent to tide these carriers over until such time as they could "stand on their own bottoms."

The mere formuation of a standard for passing on new routes thus presented no insuperable obstacle to the administrators of the Act. In an article in this JOURNAL, Mr. James M. Landis has pointed out the essential ambiguity of the support standard provided by the statute itself, and seems to attribute to this ambiguity a causative role in the present difficulties of the airlines.[4] In fact the certification of "weak" routes complained of by Mr. Landis seems to have resulted from errors in the forecasting of costs and revenues, that is, from erroneous practical application of the adopted criterion, rather than from the inherent indefiniteness of the Act itself.[5] Such mistakes could be made no matter how specific a mandate was provided by law. The really important question here is whether or not the standard employed by the Board and suggested by Congress is an acceptable guide for the satisfaction of the nation's needs.

As long as the liability of the Government to the carriers determined by this standard was within the limits foreseen by the Board, and as long as this liability continued proportionally to decrease because of the growing self-sufficiency of the carriers, the meaning and implications of the support program could be readily ignored. It had always been true that the amount and type of service supplied had been very largely determined by the carriers themselves, and that the Government had simply furnished the funds necessary to support this service. The postwar situation in which the rates of mail pay previously determined by the Board proved wholly inadequate to support the capacity supplied may serve to bring public attention to bear on the question of just what the taxpayer is obligated to pay to the carriers and why.

Again the mere formulation of a definite standard to determine this liability is not at all difficult. It is perfectly feasible to solve the problem of past, present and possible future deficits of certificated airlines by simply measuring the proper liability of the Government by the size of the deficits — as Mr. Landis phrases it, by putting both past and future operations on a "cost plus basis." [6]

In dealing with the recent financial difficulties of the certificated carriers, the Board appears to have been guided in substance by this principle, and has indicated its conviction that the law imposes upon it

[4] Landis, *Air Routes Under the Civil Aeronautics Act*, 15 J. Air L. & C. 295 (1948)

[5] It seems likely that these mistakes have occurred at least in part as a result of the Board's piecemeal approach to the issues confronting it, which may have brought about too much reliance on the contentions of the parties to each route proceeding without adequate advance independent analysis of the economic problems involved. On this, see Sweeney, *Policy Formation by the Civil Aeronautics Board*, 16 J. Air L. & C. 127, 159 (1949).

[6] Landis, *op. cit.*, p. 296.

an obligation so to act.[7] This course of action, as has already been pointed out by many, may indeed be defended as the only one consistent with the rationale underlying the Act and its past administration.[8]

However, this fact itself suggests the fundamental defectiveness of this rationale. For one thing, if such a course is actually required by law, then there is in principle no limit to the Government's possible obligation to the carriers. Since these companies can always overexpand relative to any previously fixed rate of mail pay, the Board being powerless to prevent overexpansion of capacity on routes already certified,[9] the Government is in the unenviable position of having given a blank check to airline managements.

Recognizing this, Mr. Landis has recommended that a "budget" be drawn up for certificated air transport in general and for each particular carrier, an expedient which would effectively prevent the Government's being annually presented with an indeterminate bill for airline services.[10] But this expedient evidently does not go to the heart of the matter. Mr. Landis, it will be noted, has offered no suggestion as to the objectives which should determine the over-all size and carrier distribution of this "budget."

It is submitted that the proper extent and direction of Government aid cannot be ascertained without a thorough study of the needs of the

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[7] In this connection, see the Board's *Economic Program for* 1949, February 21, 1949, pp. 5-10, wherein the Board's mail rate program is justified in terms of the objective of "placing of revenues of the United States civil air carriers in a healthy relation to their operating expenses" (p. 6), and it is stated (p. 5) that this program "represents a reaffirmation by the Board of its interpretation of the obligations imposed upon it by Section 406(b) of the Civil Aeronautics Act of 1938 . . .".

It has been suggested that retroactive mail rate increases covering substantial periods of time (with their uncomfortably clear "cost-plus" implications) can be avoided once the Board is up to date in its mail pay cases and can deal promptly with carrier applications for higher mail rates. The Board now holds (and apparently has been sustained by the Supreme Court in its contention) that it is not authorized to put into effect a new rate for a period for which a final rate had been fixed by the Board and in which an application for higher mail pay (with respect to this period) was not pending. Nevertheless, *if the accepted objective governing the size of mail pay is to enable the carrier "under honest, economical and efficient management" at least to break even,* and it turns out that a final rate previously fixed by the Board is not adequate to achieve this objective, it would seem that this result would merely represent an error on the part of the Board and that the carrier should be entitled to recover the difference between its mail receipts and its break-even need whether or not an application for higher pay had been filed or, if filed, disposed of.

[8] See, for example, SURVIVAL IN THE AIR AGE, A Report by the President's Air Policy Commission, (Washington, G. P. O., 1948), pp. 100-101: "The revenue from passengers and cargo, plus a revenue for the carriage of the mail roughly equal to the passenger rate, will not support the operations of many of the companies. If they are to continue in operation and start again up the ladder toward self-sufficiency the Government will have to increase the mail rates.

"There is no need to change the law in this respect. It already is drawn to cover exactly such a situation." (Emphasis supplied.)

[9] As CAB Chairman Joseph J. O'Connell, Jr. has pointed out, the Board has legal power to make disallowances in mail rate cases for over-scheduling—at least with regard to "need rate" carriers. See O'Connell, *Legal Problems in Revising the Air Route Pattern,* 15 J. Air L. & C. 397, 405. This presumes some level of scheduling beyond which the Board is not obligated to support the carrier. If the deficit is taken as the definitive measure of the federal obligation, then there is no logical basis for such disallowances.

[10] Landis, *op. cit.,* p. 301.

nation from the point of view of the national defense, commerce, the postal service and whatever other aspects of the national interest are considered relevant. The major defect of the Civil Aeronautics Act is not its failure to provide *definite* guides for the administrators. As we have seen, this failure can be easily remedied by the improvisation of policy standards based on the apparent intent of the framers of the Act. The fundamental defect consists in the fact that these standards are not related to a definite concept of national requirements; thus their application may well not result in the fulfilment of these requirements. Without the prior definition of the nation's needs, who can say whether the funds spent in promotion are extravagantly large or dangerously small? How is it to be decided whether a drastic program of retrenchment is in order, with perhaps the revocation of certificates now outstanding and the disappearance of certain companies from the field, or whether the Board should rather liberalize its criterion for the support of new routes and services and embark on a course of nationwide or even worldwide expansion? From a broader point of view, how can it be decided whether to continue to offer direct aid to only the carriers presently certificated, to enlarge this program to include, for example, the exclusive cargo carriers, to shift direct aid entirely to the latter group, or to cease to give any direct aid at all?

It is beyond the scope of the present article even to propose an agenda for an investigation into the nation's air transport needs. Nevertheless, brief mention of some of the problems which such an investigation would have to include will serve to indicate both the importance of the questions involved and the inadequacy of previous considerations of these issues.

National Defense Requirements

In the formulation of national policy toward civil air transport, the first necessity would seem to be a clear and complete definition of the requirements of the national defense. So far as is indicated by public records, no serious attempt has yet been made to provide such a definition, despite the fact that it appears to be all but impossible to justify any Government aid to commercial air transport except on the basis of defense needs.[11] Whatever may have been the case in the past, it seems that under present conditions the nation might safely rely on unsubsi-

[11] The National Military Establishment is only now undertaking to define in a comprehensive manner its position with respect to civil air transport policy. After being requested by the Senate Committee on Interstate and Foreign Commerce to present the views of the military on this subject, the Under Secretary of Defense informed the Committee that a study was being initiated to determine the Establishment's "present definition of the 'present and future needs of the national defense' as that phrase is used in the Civil Aeronautics Act of 1938," and asked the Committee to postpone the appearance of a witness representing the military until this study had been completed. The Under Secretary also stated that "the resultant findings may have a profound effect upon our position with respect to several of the most important issues before your Committee." Letter from Under Secretary of Defense Early to the Chairman of the Senate Committee on Interstate and Foreign Commerce, June 6, 1949.

dized enterprise to fulfill its commercial needs for air transport, just as it does with regard to commodities in general.[12] The Post Office does indeed require some quantity of air transport service for the carriage of air mail, and thus there is justified the payment to air carriers of an amount just sufficient to obtain the needed transportation. But it is difficult to see why any payment in excess of this amount should be made in the interest of the postal service. In the foreign field, it may be thought politically necessary to promote United States-flag civil air transport beyond the present commercial need for such service, or necessary from a military point of view to subsidize routes having strategic value in wartime. However, there seems to be no comparable argument for subsidizing domestic air transportation.

It may be noted here that some arguments (related to the national defense) which could be used to justify Government aid to air carriers in the past may well have now lost their force. For example, the maintenance of an aircraft industry on the scale required by defense considerations may now be assured by direct military demand; the manufacturing capacity necessary to supply the scheduled carriers with equipment is by comparison of small importance. The rate of aeronautical technical progress needed to maintain the advanced position of the United States is apparently much faster than could be supported by the commercial carriers, at least without a very large increase in Government aid. Here again, more direct methods of promotion seem to be far better adapted to the achievement of the objective. The nucleus of managerial personnel and "know-how" to organize the expanded military air cargo operations which might be necessary in the event of war are now directly available in the Military Air Transport Service. Finally, it is significant that both the President's Air Policy Commission and the joint Congressional Aviation Policy Board have relied principally on the asserted necessity of maintaining a "reserve fleet" (of unstated size) of airplanes (of unstated type) to demonstrate the present importance of civil air transport to the national defense.

A clear definition of national defense requirements is needed not only to decide whether and to what extent aid should be given to air carriers, but also to determine which types of carriage should receive aid and by what means support is to be given. If, for example, the requirements of the military should be found to consist solely of the need for a reserve fleet of cargo planes, larger in number than can at present be supported by current demand, then it might well be that the funds now spent to support the passenger service of the certificated airlines should be diverted to, say, the development and production of

[12] In this connection, it is important to note that there *may* be little actual subsidy included in the mail payments made now and in the past to the certificated carriers. The determination of the amount of the subsidy, even though on a necessarily approximate basis, is essential in order to discover what amount and type of air transportation could be supported without subsidy.

a more efficient cargo plane than is now in use.[13] In this event the inclusion of an element of subsidy in the mail payment would be hard to justify. Without such a clear definition, there is no way to judge whether the policy of aid now in being or any other proposed policy is adapted to the fulfilment of national need; more important than this, *there is no assurance that this need will be fulfilled.*

Responsibility for Profitable Operation of the Airlines

Because it assigns to the Board the role of protector and promoter of the financial welfare of the certificated air carriers, the Civil Aeronautics Act may be interpreted as laying upon that agency the ultimate responsibility for profitable operation of the airlines at any given level of Government support. This interpretation, coupled with the fact that the law leaves with the carriers the power to make almost all important economic decisions, has resulted in confusion and buck-passing with respect to the recent losses of the airlines.[14]

The problem at issue here is related to, but distinct from, the question of whether the Government is or is not obligated to make up any deficits which the carriers may incur. If indeed the Government

[13] The President's Air Policy Commission has concluded that a project for the development of a cargo plane which "can operate on a profitable basis" is the "soundest way to build up a pool of cargo planes for an emergency." SURVIVAL IN THE AIR AGE, p. 115.

[14] For example, the President of United Air Lines is able with apparent logic to make the following statement: "During the past 18 months, the domestic air transport companies have suffered a loss of $36,000,000. The Civil Aeronautics Act has a declaration of policy from which I quote: 'Assures the highest degree of safety in and fosters sound economic conditions . . . .' Sound economic conditions do not produce such tremendous financial losses. That, in itself, would reflect against the Civil Aeronautics Board." Patterson, *Stewardship of the Airlines by the Civil Aeronautics Board*, 15 J. Air L. & C. 390, 393 (1948).

This unfortunate division of responsibility is not confined to situations where, as in the airline field, the regulators administer direct support as well as economic controls; it occurs wherever the regulators are given a protective as well as a policing role. For example, in discussing the economic results of regulation in the railroad field, Mr. K. T. Healy has remarked: "It might be said that the most harmful single thing which has resulted from regulation has been the growth of an attitude among many managements and financiers that their properties are somehow due this 'fair return', regardless of almost anything that may happen, and that if they do not get it a gross injustice has been done them. In turn this leads to a failure on their part to do the constructive thing for themselves by way of 'sharpening their pencils' and improving their costs, rates, and services to meet new conditions. Any aggressive business in other fields expects to do that, rather than to fall back on the fact that its plant represents a certain investment value and should therefore automatically earn certain profits." KENT T. HEALY, THE ECONOMICS OF TRANSPORTATION IN AMERICA (Copyright 1940, by the Ronald Press Company, New York), p. 519.

And again: "It is true, of course, that the regulatory control does require the railroads to present their story in public and formally defend their proposals before a tribunal. To that extent the regulatory procedure is a bother to management, as well as, in a sense, an affront to its prestige. But what is far more significant is the tendency for managements to use the Commission as somebody to blame for all that has gone wrong or all which they do that is distasteful. In the course of table talk the Commission has had more than a little responsibility heaped on its shoulders for things with which it has never had the remotest connection. To serve as a butt for reproof may be one of the functions that the Commission has to accept in the line of duty, but it has the unfortunate effect, as far as progress in the railroad industry is concerned, of confusing the issue of where responsibility lies and who must lead toward the improvements of the future." *Ibid.*, p. 542.

is so obligated, then it is evident that, whatever the predetermined rate of mail pay, the ultimate economic responsibility lies with the Board; it is also evident that the Board should be given power commensurate with this responsibility. This point will be taken up at a later stage of the discussion.

The question here is rather one of the managerial decisions as to routes, schedules, equipment, etc., which are all-important factors in determining the financial results of airline operation at any given level of Government support. Aside from the possible use of the mail rate as a club to control the managerial decisions of the carriers, the Board's power in this connection consists largely of (1) its authority to approve or disapprove the initiation of new routes and to choose among applicant carriers the company which it deems best suited, from the standpoint of the public interest, to operate such routes; (2) its authority over commercial rates; (3) its authority to pass on such alterations in the physical character of existing services as the addition of new intermediate points or the initiation of non-stop operations; and (4) its authority to pass on proposed inter-carrier transactions such as agreements, consolidations, and route transfers.[15]

It should at once be noted that these powers have been used in the past largely as a means of preventing individual carrier actions that the Board expected to have serious financial consequences for other air transport companies. The maintenance or initiation of genuine competition between carriers – which the Board has rightly interpreted as involving the provision by different firms of genuinely substitutable services[16] – has been a secondary aim, in that it has never, *so far as available advance evidence has indicated to the Board,* been allowed to overrule the primary consideration of the protection of the revenues of affected carriers. If the recent financial straits of the airlines were in part due to the authorization of "too many" competitive routes by the Board, this appears again to be the result of inaccurate forecasting of cost and demand conditions rather than of intent on the part of the administrators.

[15] The power to suspend or modify certificates may also prove to be usable in this connection. This possibility is discussed below.

[16] It has been suggested (1) that the framers of the Act included in its policy statement a favorable reference to competition "only as a soothing antidote to the prevalent fears of monopoly" and (2) that the framers of the Act did indeed have in mind the promotion of some form of "competition," but that it was the gentlemanly emulation between essentially non-competitive services which was extolled by the Federal Aviation Commission. See, for example, Wohlstetter, *Re-Ordering the National Air Map—How Can it Be Accomplished Under the Civil Aeronautics Act?*, 15 J. Air L. & C. 466, 469 (1948). Either of these suggestions may conceivably be true; yet it seems to the present writer that the only definite conclusion as to the type of competition envisaged by the legislaors which can be drawn from the public record is that, whether genuine or imaginary, economic or spiritual, this competition was to be consistent with the preservation of the financial welfare of the affected air carriers at substantially their existing level of operations (i.e., without bankruptcy and reorganization). From this point of view, the Board's policy of permitting competition just to the extent which it believed would be consistent with that degree of protection of the revenues of the affected carriers seems to be entirely in accord with the intent of Congress.

In the opinion of this writer, the statutory powers given to the Board over airline economic decisions were not intended to be used to "plan" an air transport network in accordance with any preconceived "map."[17] In the first place, the initiative for such decisions was left entirely in the hands of the carriers;[18] in the second place, the powers possessed by the Board, in common with those powers generally held by transportation regulatory agencies in this country, are far better adapted to the protection of the regulatees from competitive inroads than to the positive achievement of such a "plan"; and in the third place, an examination of the record reveals that the intent of the Act's framers was primarily protection rather than "planning."[19]

Nevertheless, the fact that the Board is in some sense supposed to be responsible for the financial results of airline operation has given rise to a conception of its duties which goes far beyond the role given to it by the framers of the Act. Thus, much attention has recently been devoted to the possibilities of "remaking the air map," on the initiative of the Board, by such means as the revocation, modification, or suspension of certificates now outstanding, or through its power to approve or disapprove inter-carrier transactions such as consolidations and route transfers; and the Board itself has undertaken "an exhaustive study of the existing route pattern" in accordance with the recommendations of the President's Air Policy Commission and the joint Congressional Aviation Policy Board.[20]

An optimistic point of view with regard to the usefulness of the "tools" (i.e. statutory powers) now available to the Board has been expressed by Mr. Joseph J. O'Connell, Jr., Chairman of the C. A. B.; but even Mr. O'Connell recognizes that, at least in the short run, "the Board, without the active co-operation of the industry, can probably do very little," and that the Board's "tools" for a long-run "rationalization" of the industry "take a long time to use because of the requirements of 'due process.' "[21] Regarding the Board's powers over route transfers and consolidations, it is clear that the initiative under the

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[17] One of the most unfortunate features of the transportation industry is that some of its supply characteristics are readily susceptible of representation on a geographical map. This attribute is unfortunate in that it invites oversimplification of the problems involved in adjusting the supply of diverse transport services in accordance with the complex and changing demands for these services, problems which are rendered even more complicated by the changing technological conditions which affect the cost and service characteristics of the various types of transport. Thus the industry presents a tempting field to those persons who are addicted to the concept of detailed, product-by-product "economic planning."

[18] The Board, of course, has statutory power to initiate investigations, to institute enforcement proceedings, etc. This kind of initiative is obviously not the same thing as that reserved to the carriers.

[19] A contrary conclusion has apparently been reached by Mr. Louis E. Black, Jr. in his article on *Realignment of the Domestic Airline Route Pattern—Part II.*, 16 J. Air L. & C. 20, 32-34 (1949). Yet the weakness of the evidence offered in support of his position plus the author's recognition that the airlines "wrote their own ticket" in the 1938 Act seem to favor the views of the present writer.

[20] *Economic Program for* 1949, p. 14.

[21] O'Connell, *op. cit.*, p. 401.

Act lies with the carriers themselves, and that so long as this is true the Board must rely on the profit incentive of the carriers to bring about any "rationalization" of the industry.[22] It is also clear that within the framework of protective regulation and need rate subsidy, and without the exercise of some extralegal compulsion by the Board, the profit motive cannot be expected to cause carrier managements to relinquish "personal and . . . corporate ambitions"[23] to the extent required for the most efficient organization of the industry. Mr. O'Connell, though he professes to find this situation "difficult to analyze,"[24] seems to recognize the need for some outside pressure to bring about the "revision of the air route pattern" which he thinks necessary; the recently instituted investigation of the possibility of dismembering the National route system may be taken as more than a hint to private management to take some action; and Mr. O'Connell's mention of "further tools" which may be employed in this connection as a threat of further pressure in the event of failure of "voluntary" action.[25]

With respect to the only direct method of pressure now open to the Board, however, Mr. O'Connell is less hopeful than, say, Mr. Landis. This direct method is, of course, the use of the Board's power to determine mail rates as a club to compel carrier action which it believes to be desirable – a means of persuasion which, it will be noted, is not open to other regulatory bodies and is quite outside the presently accepted scope of economic regulation. The Board itself has taken the position that it has no Constitutional obligation to provide a "fair return" on the entire investment of any company; that its Constitutional obligation is met when the mail payment is sufficient to cover costs allocable to the mail service, there being included in these costs a return on the carrier's facilities used and useful in this service.[26] Mr. O'Connell, discussing the possible use of the mail pay "tool" primarily as a remedy for "over-scheduling" rather than as a means for forcing route transfers, takes the view that even for this purpose the Board "probably" cannot reduce, or threaten to reduce, mail payments to "service-rate" carriers.[27]

However, even if the range of discretion allowed to the Board by the courts should prove sufficient to enable it to force the reallocation of routes and even the dissolution of certain existing companies, it is evident that what is proposed is not regulation in any accepted sense, but the assumption of managerial powers and duties. As Mr. Wohlstetter has pointed out, Mr. Landis' proposal for the use of the mail rate to expedite route transfers amounts, in effect, to a revocation of the certificate of the carrier from which a route is transferred, and such

[22] See Wohlstetter, *op. cit.*, especially pp. 470-474.
[23] O'Connell, *op. cit.*, p. 403.
[24] *Ibid.*
[25] *Ibid.*, p. 404.
[26] See, for example, *Eastern Air Lines, Inc., Mail Rate Proceeding*, 3 C.A.B. 733, 752-756 (1942).
[27] O'Connell, *op. cit.*, p. 405.

revocation is not permitted by the Act for any reason other than wilful violation of the Act or the regulations, etc., issued under it or of the terms of the certificate.[28] In this connection, Mr. Landis himself has proposed that the Board be given power to revoke certificates on the mere ground of the non-existence of public convenience and necessity,[29] and Mr. O'Connell has significantly remarked that he "would not be bashful about requesting the power [of revocation] because of any theories which may exist with respect to the sanctity in perpetuity of a certificate of public convenience and necessity."[30]

The Board's present powers of revocation thus appear to be relatively useless as instruments of "planning." Mr. O'Connell has suggested that the powers of suspension and modification of certificates may prove to be of value here, and Mr. Black has proposed an exceedingly drastic use of the suspension power to "remake the air map";[31] but the use of these powers to accomplish route reallocations or the cessation of certificated operations is again difficult to reconcile with the intent of the Act. The instance cited by Mr. O'Connell of the use of the alteration power exemplifies regulatory protection of the revenues of a certificated line rather than service reduction in the interest of efficiency.[32]

The choice, then, is between granting to the Board, either by legislation or by reinterpretation of the Act so as to change its character completely, unprecedented power over the airlines, or relying on the profit motive without outside compulsion. The latter is recommended by Mr. Wohlstetter; but he seems to rest his case more on conformity to the Act than on probable effectiveness.[33] Mr. Landis seems more aware of the practical limitations of this method and, although he lays particular stress on the subsidized nature of the airline industry as blocking transfers which would contribute to efficiency,[34] he recognizes that the problem also arises in other regulated fields.[35] The fact is that with protective regulation, one of the key features of which is entry control geared to the preservation of the revenues of existing firms, and *a fortiori* with a program of need rate subsidy, the profit incentive cannot be expected to accomplish the changes in systemwise

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[28] Wohlstetter, *op. cit.*, p. 469. See also Ryan, *The Revocation of an Airline Certificate of Public Convenience and Necessity*, 15 J. Air L. & C. 377 (1948).

As Mr. Wohlstetter points out, Congress in conditioning the mail payment on "honest, economical and efficient management" undoubtedly had in mind the "internal operation of the air carrier" rather than what he terms "external uneconomy." Wohlstetter, *op. cit.*, p. 470.

[29] Landis, *op. cit.*, p. 297.

[30] O'Connell, *loc. cit.*

[31] Black, *op. cit.*, pp. 36-38.

[32] O'Connell, *op. cit.*, p. 404.

[33] Wohlstetter, *op. cit.*, p. 474.

[34] Landis, *op. cit.*, p. 300: ". . . so long as mail pay remains what it is, the price of an inefficient system will remain too high to permit reasonable integration with another system, and the program of merger and consolidation will remain at a standstill."

[35] *Ibid.*, p. 299: *"As the history of the railroads abundantly illustrates,* some propulsive force from outside is necessary if real progress is to be made." (Emphasis supplied.)

distribution of output that changes in demands, techniques, or relative efficiency of various managements require if production is to be best organized. The high prices which must be paid by acquiring carriers to effect desirable route transfers are a direct reflection of this fact. For protection and/or need rate subsidy give a value to the accident of temporal priority which does not exist in an unregulated, unsubsidized field.[36]

In his much-discussed dissenting opinion in the *United-Western Acquisition* case, Mr. Landis seems to limit his proposal for the use of the mail-pay power as a club to the control of the price paid in route transfers.[37] So limited, this procedure obviously would serve further to weaken the incentives for the initiation of such transactions. In his article in this JOURNAL, however, Mr. Landis appears to take more seriously the implications of the acceptance of Governmental responsibility for the efficient organization of the scheduled air transport industry and to recognize that this responsibility must involve a continuing power of readjustment which cannot be exercised with the framework of traditional regulation. The following passage indicates how far Mr. Landis feels compelled to go in this direction:

> "How can we best operate the system that has been created, is the real question at issue. And this involves the standing of the different systems, rates, equipment and safety. But routes can never quite be forgotten. The development of equipment alone calls for their constant rewriting. And systems must be brought to some kind of internal balance. The very shift in the nature of the problem may forcibly evolve a different type of technique—*of planning rather than adjudication, of less reliance on legal shibboleths and more attention to the public return to be had from public investment.* It still will require a broad gamble to be made by the public, but after all these years the extent and nature of that gamble and the portion of it that the public, as against private groups,

[36] With respect to motor transport regulation, Mr. Healy has remarked: "One of the noteworthy results of all this has been to give value to a certified motor transportation company over and above any good will or going-concern value which it may have had before. Previously, with free entry into the business, an existing carrier might have a value due to its good reputation, accounts, contacts, and the like, but it cost no more than the investment in new facilities and the building up of a rival organization to start in competition with that carrier. Today the chances are that permission could not be obtained to compete with the original carrier, so that if the prospective operator were still insistent upon going into business he would have to buy an already existing line which held a certificate, in order to fulfill his desire. Part of the purchase price would then represent equipment, at its depreciated value, and good will, and part would represent a price set on the value of the certificate." Healy, *op. cit.*, p. 547.

[37] *United-Western, Acquisition of Air Carrier Property*, 8 CAB 298, 342 (1947): "The doctrine I advocate would relate allowable sales and purchase prices to a criterion of investment and would furnish standards against which the efficiency and economy of management could be measured and subsidy granted or denied management dependent upon its conformance to these standards. For with such a standard in existence the unwillingness of management to dispose of an uneconomic route *at a price that is fair because it is bottomed on investment* would be the basis of a charge of lack of economy that would justify reduction in subsidy." (Emphasis supplied.) This substitution of Governmental compulsion for market incentives Mr. Landis impolitely describes as a way to "correct the inertia of management and restrain its greed." *Ibid.*

> should bear ought to be capable of being made more precise. Otherwise a change in public temper may dry up not only private but public funds, and a more serious blow to the future of air transportation cannot be imagined." (Emphasis supplied.) [38]

The present writer would put the problem in a slightly different way. Efficient operation of the airline system requires at the very least that power and responsibility be put unequivocally in the same hands. If the Government is to bear this responsibility, then the Government should have powers which measure up to it. If there is to be a continuing cost-plus program of subsidy, it is eminently just and desirable that the Government assume complete control of the subsidized enterprises. If the taxpayer is to underwrite anybody's mistakes, they should be those of his own appointees and not those of a group of managers not responsible to him. If, on the other hand, private managements are to bear this responsibility, then the private economic incentives making for efficiency should be freed from the dulling effect of protective regulation and need rate subsidy, and the power of management to act should be disencumbered of the obstacles placed in its path by such regulation.

There seems to be no obvious reason why a satisfactory aid program cannot be worked out which does not involve need rate support of particular airlines or in any sense justify protection of the revenues of particular companies from competitive inroads.[39] The present writer is inclined to believe that such a program would be almost sure to bring about better economic results — in terms of both static efficiency and dynamic progress — than Government "planning" and close supervision of airline operation. However, the essential point to be made here is that so long as the proper objectives of Government support and consequently also the proper method of its administration are not clearly determined, the problem of the proper aims and means of economic control will be hopelessly obscured.

Protective Regulation

It has been noted that the Civil Aeronautics Act may be interpreted as putting upon the Board ultimate responsibility for the profitable operation of the air carriers at any given level of Government

[38] Landis, *op. cit.*, p. 301. Mr. Black also seems to recognize the drastic difference in the relationship between Government and carriers which he proposes and that embodied in the traditional regulatory process. Thus, his proposal for wholesale suspension and selective reactivation of certificates is accompanied by a recommendation that the Board act in the light of a prior policy determination regarding "*to what extent the airlines should be treated as nationalized industries*" (Black's italics). Black, *op. cit.*, p. 36. At the very least, it would seem that a decision of such tremendous significance and possibly representing such a complete break with established precedent should be left up to Congress.

[39] The following methods of aid which do not involve such support may be mentioned as examples: (1) direct Government financing of research into and development of lower-cost types of aircraft and engines; (2) lease of planes to carriers at less-than-cost rates of rental; (3) preferential tax treatment; (4) provision of navigational aids at less than cost. The appropriate methods of support will of course depend on the nature of the aims to be achieved.

support. There are in principle two ways in which the Board may approach this responsibility: (1) detailed control of airline operations with a view to keeping over-all expenditures within the limits of unrestricted commercial demand and predetermined Government-granted revenues; and (2) preservation and improvement of the commercial revenues of the several supported carriers through restriction of competitive action by means of protective regulation. Thus the present financial crisis has given rise to two distinct groups of proposals for administrative action. The one group, discussed in the preceding section, would broaden the Board's powers to improve efficiency; the other, which will now be taken up, concerns itself with more effective action along the lines of protection of commercial revenues.

First of all, it should be emphasized that this latter line of action is far more in keeping with the basic rationale of the Civil Aeronautics Act and with the spirit in which it has so far been administered, than the line which leads to Governmental "planning." Thus it requires no such drastic break with precedent as is envisaged by, for example, Mr. Landis and Mr. Black. This writer has little doubt that the economic regulatory powers given to the Board by the Act were designed as a means of protection of the revenues of the carriers; and it is undeniable that these powers are far better adapted to, and have been used for, this purpose rather than for "planning." The present regulatory system, with its primary emphasis on protection of the regulatees from competition, was "sold" partly on the basis of the same vague identification of the financial welfare of particular carriers with the satisfaction of national need which has obscured the problem of Government aid.

Secondly, it is necessary to realize that the effective implementation of this protective aim is essentially in contradiction both with the achievement of the most efficient systemwise organization of air transport (a point which has been touched upon above) and, more important still, with the preservation of maximum competitive incentives for progress in the airline industry. The fact may be simply stated: Since competitive incentives to any firm are in direct proportion to the possible inroads on revenues which may be brought about by the independent actions of its competitors, and also to the possible gains which may be made at the expense of these competitors, these incentives are in inverse proportion to the degree of protection afforded to the revenues of the carrier itself and to those of its competitors by regulatory restrictions.

So long as demand continued to advance in substantially all sectors of the air transport market at a rate sufficient to absorb the supplied capacity within predetermined Government support levels, this contradiction did not become apparent. Thus the limited protective powers of and liberal economic policy followed by the Board — as exemplified in its relatively unrestrictive certification policy and its general

opposition to inter-carrier agreements dividing markets, controlling schedules and preventing independent rate action — could be temporarily reconciled with the fundamental protective aim. In a word, a more restrictive course of action did not appear to be necessary to keep the carriers from going bankrupt.

Accordingly, the recent financial "crisis" has given rise to proposals for (1) the placing of administrative policy on a more restrictive basis; and (2) the extension of the Board's statutory authority to give it greater power to quash competition.

The policy changes called for are indeed shifts of emphasis rather than reversals. As has been noted with respect to certification, the liberal policies heretofore followed have never been allowed to overrule the basic protective principle; thus the shift to a more restrictive basis is a logical adherence to basic precedent rather than a new departure. In this category of proposals we may put: (a) the Board's recent proposal for an inter-carrier agreement on a uniform increase of 10 percent in commercial rates[40]— a proposal involving outright Government sponsorship of concerted rate action by the carriers; (b) the suggestion that the mail-pay club be used to limit schedules of competitive carriers, thus constituting it "a useful weapon in setting the quantum of competition which should exist over certain routes";[41] (c) the proposal, mentioned with obvious trepidation by Mr. O'Connell, that "the Board encourage the carriers to try a system of temporary schedule control or pooling";[42] (d) some suggestions for stricter economic control of air common carriers previously exempted from much of Title IV of the Civil Aeronautics Act; (e) Mr. O'Connell's suggestion that the power to suspend or modify certificates be used to protect the revenues of carriers from inroads arising from increased service by competition over already certificated routes;[43] and (f) perhaps some of the recent suggestions for certification based on a predetermined "air map."[44]

Similarly, the proposed extensions of statutory power represent a logical development of the rationale of the Act. As an example of such a proposal, one may cite the recommendation, put forward by the

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[40] A brief account of the conference of carrier representatives sponsored by the Board in this connection may be found in an Associated Press story which appeared in the *Christian Science Monitor* of August 20, 1948.

[41] O'Connell, *op. cit.*, p. 405.

[42] *Ibid.*, p. 407.

[43] *Ibid.*, p. 404. This procedure is here exemplified by a Board action restricting the certificate of Pan American so that it could not operate a "shuttle service" between Puerto Rico and the Virgin Islands in competition with Caribbean Atlantic. *Caribbean Area Case*, 8 C.A.B. . . ., (Serial E-1981, July 20, 1948).

[44] In the preceding section, these proposals were discussed on the assumption that they were intended to be genuine attempts to plan routes and systemwise organization in terms of maximum operating efficincy. However, they may just as well represent attempts to allocate territories among carriers with a view to minimum inter-carrier competition for protective purposes. In view of the general tenor of the context, it would perhaps be correct to place the "map" proposal of the President's Air Policy Commission in the latter class. SURVIVAL IN THE AIR AGE, pp. 110-111.

President's Air Policy Commission and others, that the Board be given economic regulatory power over air contract carriers.[45]

If all these proposals had been put into practice, they might or might not have been effective *in the present instance* to improve the commercial revenues of the mail carriers to an extent sufficient to make operations profitable at the then existing mail rates. It is always possible that at some time in the future – if not now – this policy would not suffice to achieve this objective. Neither these measures nor the extensive power over the industry envisaged by the "planners" can assure the complete control of cost and demand factors which would be necessary to guarantee the carriers against losses at any given mail rate. This guarantee can be made only by means of a cost-plus subsidy.

Protective regulation can, however, shore up the commercial revenues of the supported companies so that (a) any predetermined mail rates would be more likely to be adequate to assure the profitability of all the carriers and (b) the liability of the Government would be smaller at the end of any operating period under a cost-plus arrangement. The resulting reduction in Government expenditures is made at the expense of the airline users by restricting their ability to choose between competitive services and/or by increasing the price of a given service as compared with what it would be in the absence of protection. Aside from the questionable justice of this procedure, it is evidently objectionable in that it makes impossible the calculation of the real cost of the support program, which includes not only direct payments by the Government[46] but an indeterminable amount borne by the travelling and shipping public. Nevertheless, so long as Government payments are based on the "need" of particular carriers, there will be a tendency for Government officials to sponsor protective regulation as a means of reducing the direct expenditures involved in the support program.

One might conclude that from the point of view of economic efficiency as well as from that of fiscal clarity a regime of full Government planning would be more desirable than the continuance or extension of the present policy of regulatory protection. However, it can also be argued that still better results could probably be obtained by aban-

[45] *Ibid*, p. 112.

[46] An additional factor which obscures the cost of the support program is the hitherto unsolved problem of how much of the mail payments as now determined should be regarded as necessary cost of the mail service. In principle, all direct payments in excess of the minimum necessary to obtain an amount of mail service which has been found on an independent basis to be desirable should be regarded as subsidy. In practice, it is exceedingly difficult to calculate this minimum necessary cost, since, in the first place, the very routes on which mail payments are made have not been chosen primarily on the basis of postal need. Secondly, the minimum which would be necessary to obtain the desired type of mail service *over these routes* can probably not be *precisely* calculated. It is beyond the scope of this article to go into the various theoretical and practical difficulties involved; however, the main point to be made is that without an independent definition of the desirable amount and type of mail service, and a route-by-route determination of the least expensive way to obtain this service, no defensible division can be made between mail cost and subsidy.

doning both planning and protection for a regime of competition the regulation of which would be largely directed to keeping competitive endeavor within desirable channels. Such a regime, of course, could not possibly work within a framework of need rate subsidy for particular carriers.

Conclusion

In the preceding discussion, an attempt has been made to point out (1) that the national program of airline support through the mail payment is now and has been since its beginning inadequately oriented in terms of national need; (2) that the present legisation has resulted in an unfortunate division of ultimate responsibility for the profitable operation of the airlines at any given level of Government support; (3) that the assumption of this responsibility by the Board demands the assumption of complete power over airline operations; and (4) that the present scheme of protective regulation is essentially in contradiction with maximum efficiency and maximum competitive stimulus in the airline field. It has also been brought out that problems of economic regulation are closely related to the support program: for example, a cost-plus support program justifies and demands complete managerial control by the Board; short of this, this type of support program may be used as a basis for an argument in favor of protection of the commercial revenues of supported carriers in order to reduce the direct cost to the Government.[47]

The keystone of a rational program of economic control is therefore the development of a support plan based on an adequate definition of national need, in terms of which the best method of administering Government aid and the appropriate type of economic control may be determined. The direct importance of such a plan — in order to assure so far as possible that the national need will be met — is obvious. It is therefore recommended that Congress undertake as soon as possible to define the air transport needs of the United States from the point of view of the national defense, the postal service, and whatever other aspects of national interest may be considered relevant; that it develop a program of support (if support is found to be necessary) devised so as to meet these needs in the most efficient manner; and that it then investigate thoroughly and without prejudice the problem of economic control of air transport.

[47] It is, of course, not at all certain that the assumption of complete managerial control by the Govenrment would put an end to protective restrictions. In this connection, one may recall the exceedingly drastic restrictions which have been placed on competing forms of transportation in countries where Government-owned railways have suffered decreases in revenues as a result of outside competition.

RATE-MAKING AND THE IATA TRAFFIC CONFERENCES

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I. THE BERMUDA CONFERENCE, 1946—BACKGROUND

AS a consequence of the failure of the British and American representatives to come to a complete economic agreement during the Chicago Conference, late in 1944, an inter-governmental conference of the two powers met in Bermuda in January, 1946, and concluded the Agreement relating to Air Services between the United Kingdom and the United States of America, signed on February 11th, 1946.

The principles expressed in the Resolution of the Final Act of the Bermuda Conference are well known and it is not within the scope of this article to explore them further than is necessary to show their effect on rates. It was agreed "that the two Governments desire to foster and encourage the widest possible distribution of the benefits of air travel for the general good of mankind at the *cheapest rates consistent with sound economic principles*" (Emphasis supplied throughout) and "that there shall be a fair and *equal opportunity* for the carriers of the two nations to operate on any route between their respective territories."

These principles were developed further in Annex II of the Bermuda Agreement [1] which declares that rates shall be fixed at reasonable levels, due regard being paid to all relevant factors, such as cost of operation, reasonable profit and the rates charged by any other air carriers.

The Bermuda Agreement was a compromise between the British and American views but, since this is the first time in any air transport agreement that an undertaking regarding rates appears, it represents great progress in the development of international rate making.

Annex II of the Bermuda Agreement can be considered as a set of rules to safeguard the principles expressed in the Final Act of the Bermuda Conference, and as a guaranty of reasonable rate control over international air carriers, the stipulation that *"all rates to be charged*

* The opinions expressed in this article are those of the writer and do not necessarily represent the official point of view of the International Air Transport Association (IATA).

[1] "(h) The rates to be agreed in accordance with the above paragraphs shall be fixed at reasonable levels, due regard being paid to all relevant factors, such as cost of operation, reasonable profit and the rates charged by other air carriers." Agreement between the Government of the United Kingdom and the Government of the United States of America, relating to Air Services between their respective territories, Bermuda, 11 February, 1946 (Bermuda Agreement), Annex II, ¶(h).

. . . shall be subject to the approval of the Contracting Parties within their respective Constitutional powers and obligations" [2] expressly reserves the right to each contracting party to disapprove any rate proposed by the other's carriers. Thus the control over any operation between the respective territories is finally exercised by the contracting states.

Application of the Rate Provisions

It is provided in Annex II, Para. (a), of the Bermuda Agreement that the respective regulations concern only rates to be charged between points in the territory of the United States and points in the territory of the United Kingdom. Thus, it appears that the contracting parties restricted themselves to some extent and, purposely or not, failed to apply the rate provision between points outside their respective territories. If the structure of rate regulations in the Annex is to be looked at from this rather narrow point of view, the question arises as to what law and regulation are effective in respect of rates of flights which:

(a) originate in points in a third country,
(b) terminate in points of a third country,
(c) originate in country A, fly through one or both of the contracting parties' territories and terminate in country B.

Difficulties are bound to arise and, when one of the contracting parties disputes a through rate, there appears to be no procedure in the Agreement for remedial action. Thus, there has recently arisen a situation in which an American carrier filed a competitive rate from London to Sydney via New York which was protested by British and Australian operators providing service between the same two points, but via the Middle East. While there was much comment, there appears to be little opportunity for redress under the terms of either the Bermuda Agreement or the United States-Australian Agreement. Admittedly the route originates in London, under the terms of the Bermuda Agreement, and terminates in Sydney under the United States agreement with Australia, but neither agreement covers the through rate for the whole route. In the same way, British and Australian companies could, if they wished, offer a competitive fare to Americans from the East Coast of the United States to Sydney, via London. Under the present regime, the situation is such that no single Traffic Conference of the International Air Transport Association can dispose of it; agreement on a through rate of this kind must be reached through composite meetings of all three IATA Traffic Conferences.

[2] "(a) Rates to be charged by the air carriers of either Contracting Party between points in the territory of the United States and points in the territory of the United Kingdom referred to in this Annex shall be subject to the approval of the Contracting Parties within their respective constitutional powers and obligation. In the event of disagreement, the matter in dispute shall be handled as provided below." Bermuda Agreement, Annex II, ¶(a).

Approval of the Conference Machinery by the CAB

In Annex II, Para. (b) of the Bermuda Agreement,[3] it is declared that:

(1) the CAB of the United States had announced its intention to approve the IATA rate conference machinery for one year, and

(2) any rate agreements concluded through this machinery during that period would be subject to Board approval if they involved American-flag operators.

Approval of the IATA conference machinery by the United States came as a result of lengthy consideration. Under general American law, a carrier participating in an agreement to fix rates, frequencies or capacities would be subject to possible prosecution under the antitrust statutes. Nevertheless, the conference method of rate-making received favorable recognition in the Shipping Act of 1916, which contains provisions [4] indicating that Congress foresaw use of this device and making such agreements subject to the approval of what is now the Maritime Commission. It has also been accepted by Shippers, Regulatory Commissions and Carriers in Rail Transport.

Similarly, while no specific procedure for reaching rate agreement is mentioned in the Civil Aeronautics Act of 1938, Sec. 412 requires that agreements between air carriers be filed with the Board and Sec. 412 (b) [5] makes them subject to CAB approval. If the Board does not find an agreement entered into by a U.S. airline against the public interest,

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[3] "(b) The Civil Aeronautics Board of the United States having announced its intention to approve the rate conference machinery of the International Air Transport Association (hereinafter called IATA), as submitted, for a period of one year beginning in February, 1946, any rate agreements concluded through this machinery during this period and involving United States air carriers will be subject to approval by the Board." Bermuda Agreement, Annex II, ¶(b).

[4] "Every common carrier by water, or other person subject to this chapter, shall file immediately with the commission a true copy . . . of every agreement, with another such carrier or other person subject to this chapter . . . fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges, or advantages; . . . or in any manner providing for an exclusive preferential, or cooperative working arrangement. The term 'agreement' in this section includes understandings, conferences, and other arrangements." 39 Stat. 733 (1916), 46 U.S.C.A. §814 (1944).

[5] "The Authority shall by order disapprove any such contract or agreement, whether or not previously approved by it, that it finds to be adverse to the public interest, or in violation of this Act, and shall by order approve any such contract or agreement, or any modification or cancellation thereof, that it does not find to be adverse to the public interest, or in violation of this Act; except that the Authority may not approve any contract or agreement between an air carrier not directly engaged in the operation of aircraft in air transportation and a common carrier subject to the Interstate Commerce Act, as amended, governing the compensation to be received by such common carrier for transportation services performed by it." (*As amended by Act of May* 16, 1942, 56 Stat. 301.)

approval follows and carrier is relieved from operation of antitrust laws by Sec. 414 [6] of the Act of 1938.

CAB Control of International Rates

That Act empowered the Board to determine fair and reasonable rates of pay for flying the mail,[7] fix different rates for different air carriers and different classes of service,[8] and to remove discriminatory, preferential or prejudicial rates.[9] It must be noted, however, that the CAB has no direct control over rates of U.S. carriers operating internationally,[10] although it has requested amendment of the Act to secure such power.[11]

It is provided in Sec. 1002 (d) that the Board may prescribe only a just and reasonable maximum and/or minimum rate, fare or charge for

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[6] An important pronouncement of Congressional policy in such matters is incorporated in Section 414 of the Civil Aeronautics Act:

> "Any person affected by any order made under Sections 408, 409 or 412 of this Act shall be, and is hereby, relieved from the operations of the 'antitrust laws,' as designated in Section 1 of the Act entitled 'An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,' approved October 15, 1914, and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order."

[7] *Civil Aeronautics Act of* 1938, §401.

[8] "(b) In fixing and determining fair and reasonable rates of compensation under this section, the Authority, considering the conditions peculiar to transportation by aircraft and to the particular air carrier or class of air carriers, *may fix different rates for different air carriers or classes of air carriers and different classes of service.* In determining the rate in each case, the Authority shall take into consideration, among other factors, the condition that such air carriers may hold and operate under certificates authorizing the carriage of mail only by providing necessary and adequate facilities and service for the transportation of mail; such standards respecting the character and quality of service to be rendered by air carriers as may be prescribed by or pursuant to law; and the need of each such air carrier for compensation for the transportation of mail sufficient to insure the performance of such service, and together with all other revenue of the air carrier, to enable such air carrier under honest, economical and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense." §406(b).

[9] "(f) Whenever, after notice and hearing, upon complaint, or upon its own initiative, the Authority shall be of the opinion that any individual or joint rate, fare, or charge demanded, charged, collected, or received by any air carrier or foreign air carrier for foreign air transportation, or fare, or charge or the value of the service thereunder, is or will be unjustly discriminatory, or unduly preferential, or unduly prejudicial, the Authority may alter the same to the extent necessary to correct such discrimination, preference or prejudice and make an order that the air carrier or foreign air carrier shall discontinue demanding, charging, collecting, or receiving any such discriminatory, preferential, or prejudicial rate, fare or charge, or enforcing any such discriminatory, preferential, or prejudicial classification, rule, regulation or practice." §1002(F).

[10] It is quite obvious that the control of rates in foreign air transportation was excluded from the scope of power of the CAB and that is further evidenced in Section 404(c):

> "The Authority is empowered and directed to investigate and report to the Congress within one year from the effective date of this section, to what extent, if any, the Federal Government should further regulate the rates, fares, and charges of air carriers engaged in foreign air transportation, and the classifications, rules, regulations, and practices affecting such rates, fares, or charges."

[11] See 1948 Annual Report of CAB, 13, and 1947 Report 12 as well as 1946 Report 12 for some examples. See H.R. 2911 and §12(a) of S. 237 introduced by Representative Kennedy and Senator Johnson respectively, in the 81st Congress, 1st Sess., to implement the request.

overseas air transportation by American operators. The only substantial power that the Board possesses over the rates of the United States international carriers is *when the United States air carriers enter into rate agreements with each other or with foreign air carriers.* Under such circumstances, "the Board may approve or disapprove the rates embodied in such agreements." Thus, because rates became the subject of the agreements, the Board indirectly acquired more power over United States international carriers than had been conferred directly by the Act. It should be emphasized, however, that this control over international rate agreements is still not as great as that possessed over domestic transportation where the power to fix rates is specifically granted.

The Civil Aeronautics Act has been interpreted in different ways. The official point of view on competition is expressed in the following opinion of the Board:

> "The competition contemplated by the Civil Aeronautics Act is not the unlimited and uncontrolled competition which permits destructive rates having no relation to the cost of operation but having the power to provoke subsidy wars among nations. The Civil Aeronautics Act as construed by this Board regulated competition which seeks to avoid the stifling influence of monopoly on the one hand and the economic anarchism of unrestrained competition on the other."[12]

The conception incorporated in the above-quoted opinion is inherent in the Board's opinion approving the Traffic Conference machinery of IATA:

> "We cannot accept without proof the proposition that the present resolution, which establishes the only presently available machinery whereby the United States Government through this Board can share and have a voice in the regulation of the rates of our international air carriers, is inconsistent with that policy of controlled competition which the Civil Aeronautics Act contemplates. How are we disposed to declare without proof that the full benefits of competition, including the gearing of rates in international air transportation to the costs of the most efficient operator, will be realized under the procedure of consultation and agreement between the international air carriers? We refrain, therefore, from prejudging on this ground a proposal that is both assailed and supported by only theoretical considerations."[13]

This position was reaffirmed by the Board in 1947 and in 1948, when the Board again found that participation by American flag carriers in the IATA Traffic Conferences would not be against the public interest or in violation of the Civil Aeronautics Act, thereby continuing its temporary approval which commenced in February, 1946, and termi-

[12] IATA Traffic Conference Resolution, Agreement CAB No. 493 (Ser. 4525, Feb. 19, 1946), p. 9.

[13] Agreement CAB No. 493 (Ser. 4525, Feb. 19, 1946), p. 9, 10.

nated in February, 1947, to February, 1948 [14] and later to February 28, 1950.[15]

The requirement incorporated in Paragraph (b), Annex II of the Bermuda Agreement that agreements concluded through IATA Traffic Conference machinery need to be approved by the CAB is of great importance. Its purpose is to extend the power of the CAB over the international operations of United States carriers.

There is a further effect of the Board's reservation to approve or disapprove the agreements reached by the American carriers through the IATA Conference machinery. It reserves the right to the U.S. Government to exercise a final control over the participation of its carriers in an international body, without which this latter could validly bind the U.S. carrier, and consequently affect indirectly the U.S. public without any check or balance. It seems that this proviso aims at conferring upon the CAB a control similar to that possessed by other foreign governments' aeronautical agencies.

The international importance of the question lies in the belief that the government, by having control over the rates of its own carriers, will prevent uneconomic rate-cutting and thus avoid international conflicts.

There is no approval of IATA Conference machinery expressed by British authorities because there is no need for such approval, the United Kingdom not having legislation similar to Section 412 (b) of the Civil Aeronautics Act; nor has the United Kingdom antitrust laws, necessitating a previous approval of the machinery which provides means for rate agreements. However, as previously mentioned, in Paragraph (a), Annex II, of the Bermuda Agreement, it is provided that rates are subject to government approval.

British carriers can participate in conferences without breach of any domestic law. This consideration throws some light on why British authorities found participation in the IATA Traffic Conferences one solution to the problem of unlimited competition; they held the view that the different national carriers, in participating in this machinery would exercise the best control over those efforts which were aimed at the elimination of uneconomic rate-cutting.

To sum up, the United States Delegation entered into the Bermuda conversations at a disadvantage. The Government of the United Kingdom had full authority to regulate the rates of its own flag carriers leaving the United Kingdom for other countries and the rates of the carriers of other flags entering the United Kingdom. But the United States Government had direct authority over the rates of foreign carriers coming into the United States. Except by indirect methods, it could not influence the rates which American international carriers charged.

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[14] Agreement CAB No. 493 (Ser. E-269, Jan. 31, 1947).
[15] Agreement CAB No. 493 as revised by Agreement CAB No. 1175 (Ser. E-1227, Feb. 20, 1948).

Thus, when the two governments stated in the Bermuda Agreement that they had the right to approve or disapprove the rates charged by the carriers, this expression actually affected only the United States.

The peculiar character of American legislation had put the Civil Aeronautics Board deliberately in a position where the only way it could have any real check on the rates charged by its own airlines was through its power to approve agreements between carriers, who were, as a result, exempted from the operation of the antitrust laws. It might be of some interest to note that in connection with the power conferred upon the Board in Section 404 (c) of the Act, the Board in 1939 recommended against control of rates in foreign air transportation. It now favors control.[16]

Without this power, and without the Traffic Conference as machinery, the Board would have less direct authority over the rate policies of an American flag carrier than any one of a large number of foreign governments.

Substitution for IATA Traffic Conference

The Bermuda Agreement foresaw certain circumstances,[17] where, if no IATA Conference machinery were available, a rate agreement was not approved within a reasonable time by either contracting party, or, finally, if either contracting party withdrew or failed to renew its approval of that part of the Conference machinery relevant to the provision, it would be necessary for the contracting parties to use a substitute procedure described in Paras. (e) and (f) of Annex II of the Agree-

[16] See note 11, *supra*.

[17] "(d) The Contracting Parties hereby agree that where—

(1) during the period of the Board's approval of the IATA rate conference machinery, either any specific rate agreement is not approved within a reasonable time by either Contracting Party, or a conference of IATA is unable to agree on a rate, or

(2) at any time no IATA machinery is applicable, or

(3) either Contracting Party at any time withdrawn or fails to renew its approval of that part of the IATA rate conference machinery relevant to this provision,

the procedure described in paragraphs (e), (f) and (g) hereof shall apply.

"(e) In the event that power is conferred by law upon the aeronautical authorities of the United States to fix fair and economic rates for the transport of persons and property by air on international services, and to suspend proposed rates in a manner comparable to that in which the Civil Aeronautics Board at present is empowered to act with respect to such rates for the transport of persons and property by air within the United States, each of the Contracting Parties shall thereafter exercise its authority in such manner as to prevent any rate or rates proposed by one of its carriers for services from the territory of one Contracting Party to a point or points in the territory of the other Contracting Party from becoming effective, if in the judgment of the aeronautical authorities of the Contracting Party whose air carrier or carriers is or are proposing such rate, that rate is unfair or uneconomic. If one of the Contracting Parties on receipt of the notification referred to in paragraph (c) above is dissatisfied with the new rate proposed by the air carrier or carriers of the other Contracting Party, it shall so notify the other Contracting Party prior to the expiry of the first fifteen of the thirty days referred to, and the Contracting Parties shall endeavour to reach agreement on the appropriate rate. In the event that such agreement is reached, each Contracting Party will exercise its statutory powers to give effect to such agreement. If agreement has not been reached at the end of the thirty-day period referred to in paragraph (c) above, the proposed rate may, unless the aeronautical authorities of the country of the air carrier concerned see fit to suspend its

ment. For the purpose of this substitute procedure two periods are distinguished, one before and the other after the Board has been given the power, by law, to regulate international rates.

The first divergency between the two periods is, that while in the second period it is agreed that each of the contracting parties, if in the judgment of their Aeronautical Authorities a rate proposed by one of its carriers is unfair or uneconomic, shall exercise its authority in such manner as to prevent such rate from becoming effective.

The distinction between these two periods becomes significant if one of the contracting parties is dissatisfied with the way in which the other has exercised its control. In this case, if upon receipt of notification (thirty days before the proposed date of introduction) one of the contracting parties did not agree to the new rate proposed by the air carrier of the other contracting party, it could so inform the other in a given period (before the expiry of the first fifteen of the thirty days referred to above). Both contracting parties thereupon would try to reach an appropriate rate agreement at a government level and if such an agreement were reached, in the second period *both would use their statutory powers to make such agreement effective.* In the first period, however, the contracting parties, only agree that they *"will use their best efforts to cause such agreed rate to be put into effect by its air carrier or carriers."* Thus, because one of the contracting parties has no statutory power over international rates, no reference is made to such power.

The distinction between the two periods is still more important if no agreement is reached by the government authorities at the end of the thirty day period.

In the second period, the disputed rate may go into effect and the only party who can prevent its operation is the government authority of the country of the air carrier concerned — the other government authority has no veto right over the temporary introduction of a disputed rate pending the settlement of the dispute. The position is completely reversed in the first period where the objecting party may prevent the inauguration of the service in question.

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operation, go into effect provisionally pending the settlement of any dispute in accordance with the procedure outlined in paragraph (g) below.

"(f) Prior to the time when such power may be conferred by law upon the aeronautical authorities of the United States, if one of the Contracting Parties is dissatisfied with any new rate proposed by the air carrier or carriers of either Contracting Party for services from the territory of one Contracting Party to a point or points in the territory of the other Contracting Party, it shall so notify the other prior to the expiry of the first fifteen of the thirty-day period referred to in paragraph (c) above, and the Contracting Parties shall endeavour to reach agreement on the appropriate rate. In the event that such agreement is reached, each Contracting Party will use its best efforts to cause such agreed rate to be put into effect by its air carrier or carriers. It is recognized that if no such agreement can be reached prior to the expiry of such thirty days, the Contracting Party raising the objection to the rate may take such steps as it may consider necessary to prevent the inauguration or continuation of the service in question at the rate complained of." Bermuda Agreement, Annex II, ¶(d), (e) and (f).

Thus, in the second case, the party who raised the objection is obliged to permit the provisional operation of the contested rate, whereas in the first case, he may bar the operation of the disputed service.

This distinction already appears not to be negligible but the emphasis in the last paragraph of Annex II [18] on the promise of the Executive Branch of the Government of the United States "to use its best efforts to secure legislation empowering the aeronautical authorities of the United States" to fix rates relating to international transport comparable to that manner in which the Board at present is empowered to act with respect to domestic transportation is the best proof that effective government control of international civil aviation was desired, not only by the United States authorities, but as well by the United Kingdom authorities. Both the U.S. and British Governments were anxious to have the CAB acquire effective control over the international operations of American flag carriers.

Settlement of Disputes

In case the parties fail to reach agreement [19] through direct consultation upon the request of either, both agree to submit the question for an advisory report to PICAO, or its successor, ICAO, and to use their best efforts under the powers available to them to put into effect the opinion expressed. "Advisory report" seems a rather cautious expression of the final result of an international settlement but as no precedent has been created its interpretation cannot be given with any certainty.

This stand of the parties regarding disagreements is of great importance. It reflects the serious differences in concept which existed between some of the European countries and the United States in the Chicago Conference of 1944. The United States, at that stage, was not prepared to accept the economic rule of an international tribunal. In the Bermuda Agreement, however, it appears that some concession was made toward acceptance of authority of an international agency. The articles regulating disputes in the later bilateral agreements show whether or not the United States' point of view has advanced further and how the British concept developed.

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[18] "(j) The Executive Branch of the Government of the United States agrees to use its best efforts to secure legislation empowering the aeronautical authorities of the United States to fix fair and economic rates for the transport of persons and property by air on international services, and to suspend proposed rates in a manner comparable to that in which the Civil Aeronautics Board at present is empowered to act with respect to such rates for the transport of persons and property by air within the United States." Bermuda Agreement, Annex II, ¶(j).

[19] "(g) When in any case under paragraphs (e) and (f) above the aeronautical authorities of the two Contracting Parties cannot agree within a reasonable time upon the appropriate rate after consultation initiated by the complaint of one Contracting Party concerning the proposed rate or an existing rate of the air carrier or carriers of the other Contracting Party, upon the request of either, both Contracting Parties shall submit the question to the Provisional International Civil Aviation Organization, or to its successor for an advisory report, and each party will use its best efforts under the powers available to it to put into effect the opinion expressed in such report." Bermuda Agreement, Annex II, ¶(g).

The problems involved [20] are as follows:

(1) the nature of the tribunal,
(2) the authority and type of decision of the tribunal, and
(3) temporary remedies and sanctions.

A detailed analysis of various methods of handling disputes is hardly necessary here. As a practical matter, it is apparent that the machinery now used to reach rate agreements has successfully fulfilled the expectations of the nations which have expressly or implicitly approved it. Those disputes which have occurred have been localized. The process of hammering out an agreement to raise or lower a rate has been confined to the Conferences, where the individual interests of the carriers and, indirectly of their governments, can be safeguarded without recourse to open economic warfare.

The successful operation of the Conferences has been recognized, not only by the bilateral agreements negotiated since Bermuda, but also by the text of the Draft Multilateral Agreement. Since the states who would be parties to this agreement have already acknowledged and adopted its principles in their bilaterals, adoption of the multilateral by them should not be difficult.

The differences between the various concepts of settlement of rate disputes has had no practical importance to date, but it might have serious effects upon the goodwill of states, particularly in the case of an advisory report which could not be put into effect because of a lack of "available domestic powers." The solution proposed in the Draft Multilateral Agreement, however, seems sound and, if generally accepted, offers a restatement in international transportation of the principle that every state is equally bound by its contracts and that the undertakings of the states are equally enforceable against all contracting parties.

II. IATA TRAFFIC CONFERENCES

The bilateral agreements repeatedly recognize the existence and authority, the machinery and recommendations of the Traffic Conferences of IATA. These Conferences have frequently been the subject of discussion, argument and criticism, but no substitute has yet been offered that would be acceptable to all governments concerned.

Before the Bermuda Conference, three suggestions to end the unregulated rate situation were discussed. These were:

(1) to subject rates to the approval of an international aeronautical agency, on a governmental level;
(2) to fix every international rate by means of a bilateral agreement (without creating an international agency);

[20] The procedure adopted by the bilateral agreements for settling disputes is duly summarized in "Bilateral Agreements—Chicago Type," ICAO Doc. AT.526 23/10/47, and elaborated by Ludwik Rabcewicz-Zubkowski, *"Le reglement des differends internationaux relatifs a la navigation aerienne civile."* Revue Francaise de Droit Aerien No. 4.

(3) to fix rates by agreement among the carriers operating in a given region.

The first suggestion was not new; it had been considered previously at Chicago where the American representatives objected on the grounds that there were, at that time, no set principles to serve as a guide for such an international agency, and that the decisions of the agency would be ineffective because they would not have the backing of law.

While there was no likelihood at Chicago that such an agency would be established, there was some discussion of how it might operate. It was suggested that it could fix rates on the principle of the "costs of the most efficient operator," but the general reaction seemed to be that it would be improbable that such a governmental agency could determine who the most efficient operator was and what its costs might be.

There were, it was pointed out, quite wide differences in standards of living between countries. Some airlines were government enterprises, either in ownership or control, and might not be required to pay taxes or to seek their capital in the open market. Airlines might also be assisted by hidden subsidies and benefits, such as free use of airports, radio aids and navigation facilities; government-financed training or equipment purchase; and other cost reducing factors. In the domestic field, these factors might be open to investigation by a national government but before an international tribunal attempting to determine a rate, they might well be closely guarded secrets whose withholding could unduly influence the international rate structure.

In short, the powers which an international rate-making agency would need in order to operate satisfactorily constituted a yielding of national sovereignty to an extent which few nations were willing to countenance.

In considering the suggestion that rates be determined at a government level without the establishment of an "International Civil Aeronautics Board," it must be realized that rate-making on an international level, even between two countries only, is a complicated matter. It is a highly specialized function, which must be exercised by well-trained specialists, and must take into consideration a great many conflicting points of view, both national and international.

The conflict of these interests could be only solved through the negotiation of further bilateral agreements with countries indirectly interested in the rates on a given route. It is doubtful, however, whether such a system could operate with the elasticity required in the formulation of rate agreements. By the time a series of bilateral agreements could be drawn up and agreed upon, the situation underlying them might be completely changed, thus requiring new rate agreements and a reopening of the entire procedure.

The third suggestion, to leave rates to agreement among carriers, had practical advantages. The consideration that the operators are

those who have the greatest experience in the rate-making field and have the personnel required for the efficient handling of rate questions, led to the conclusion that the practical solution of the unsatisfactory open rate situation was to let the carriers make their own agreements through the already established IATA rate conference machinery. This position was adopted in Bermuda and has been reaffirmed since by the majority of the countries engaged in international air transport operations.

In turning to the work of the Traffic Conferences, it should be kept in mind that the principles established in the Bermuda Agreement are those which govern the Conferences.

In order to appreciate fully the progress and machinery of the Conferences, two general points should be kept in mind: first, the Traffic Conferences have only been working for a few years and their procedures, rules and approach to problems are under constant development. The aim to achieve better transportation at lower rates is coupled with the endeavor to establish more efficient procedures and to achieve these aims in the shortest possible time.

Second, it must be recognized that reasonable uniformity is an important aid to more economical operation. The Traffic Conferences have adopted this principle and their resolutions are to a great extent influenced by it. The question of how far uniformity is reasonable is rather arguable and only future experiences will prove whether the limits adopted by the Conferences will be practical and what modifications, if any, may be necessary.

Areas, Regulations, Authority of the Conferences

The machinery of the IATA Rate Conferences is set down in the "Provisions for the Regulation and Conduct of the Traffic Conferences."

The world is divided into three Traffic Conference areas, which may be described as follows:

Traffic Conference No. 1. Encompassing all of the North and South American Continents and the islands adjacent thereto; Greenland; Bermuda; the West Indies and islands of the Caribbean Sea; the Hawaiian Islands (including Midway and Palmyra).

Traffic Conference No. 2. Covering all of Europe (including that part of the Union of Soviet Socialist Republics in Europe) and the islands adjacent thereto; Iceland; the Azores; all of Africa and the islands adjacent thereto; Ascension Island; that part of Asia lying west of and including Iran.

Traffic Conference No. 3. Including all of Asia and the islands adjacent thereto except that portion included in Traffic Conference No. 2; all of the East Indies, Australia, New Zealand, and the islands adjacent thereto; the islands of the Pacific Ocean except those included in Traffic Conference No. 1.

In addition to rates, the Traffic Conferences are authorized to consider and resolve all traffic matters involving passengers and cargo in their respective areas. Every active member of IATA operating in the territory of each Traffic Conference enjoys the right of a voting membership in that Conference.[21]

The authority of the Conferences is derived from the IATA General Meeting and, according to their Provisions, the aims, objectives and purposes of the Conferences are those of IATA: to promote safe, regular and economic air transport, to provide means for collaboration among the air transport enterprises; to foster air commerce and to study the problems connected therewith; to cooperate with the International Civil Aviation Organization and other international organizations.

A great part of the preliminary work of the Conferences is carried out by their permanent Sub-Committees, of whom two should be mentioned here: The Costs Sub-Committee and the Fares, Rates and Charges Sub-Committee.

The duties of the Sub-Committees are usually prescribed at the time of their creation. Their recommendations are considered and acted upon by the Traffic Conferences.

Meetings, Voting

In connection with the formalities of the meetings of the Traffic Conferences, at least thirty days' notice must be given before the date fixed for the meeting, an Agenda must accompany this Notice of Call, and all members have the right to request that matters be placed on the Agenda.

The Traffic Conferences reach their final agreements through voting, which is carried out by the accredited representatives of each member. Regarding rates, action may be only taken upon the unanimous affirmative vote of the members represented at any meeting. The failure of any member present at a meeting to vote is expressly deemed to be an affirmative vote.

This unanimous agreement appears to be a basic protection for all members concerned and represents a serious guarantee to the governments whose airlines are members of Conferences. Individual Conference members may take independent action, and other carriers cannot bind a dissenting member by their eventual agreements. Perfect

[21] 1. Each Traffic Conference may consist of two classes of members, voting and non-voting. Each active Member of IATA which operates scheduled commercial international air transport services between two or more points within the area of any Traffic Conference shall be a voting member of that Traffic Conference.

2. Each active Member of IATA which has scheduled commercial international air transport operations between a single point within the area of one Traffic Conference and one or more points in another Traffic Conference area shall be qualified for voting membership in both of such Traffic Conferences and must become a voting member of one of them.

3. Any Member of IATA may become a non-voting member of a Traffic Conference in which it cannot qualify as a voting member upon its request to the Secretary of such Traffic Conferences.

protection against actions contrary to its interest is afforded the individual carrier because:

(i) no matter can be acted upon unless it has been notified to all members thirty days in advance of the meeting;

(ii) every member has the right to be represented at all Conference meetings;

(iii) any individual Conference member can veto a resolution with which it disagrees.

There are detailed provisions incorporated in the regulations of the Conferences for action by mail, for procedures to be followed at single and joint Conference meetings, for presiding officers, and for voting and non-voting membership. The amendment of these provisions has been left to the Executive Committee of IATA, which has from time to time approved changes to adapt Conferences to the needs of practical experience.

Disputes

It is difficult to determine what remedies are available to the carriers in the courts of various countries for a breach of agreement reached at the Conferences. Certain countries would undoubtedly uphold rate agreements, while others might not necessarily do so. It is, therefore, evident that carriers have been compelled to attempt a system of self-regulation to safeguard their agreements.

Every member of a Conference may stop Conference action by exercising its right to veto the agreement concerned, but if no such veto is expressed each Conference member expects the others to comply with the agreement. It is evident that a breach of a Conference agreement is not an act of free competition, but an entry into unfair competitive practice, against which other parties to the agreement must be reasonably protected. The machinery of the Conferences would be largely ineffective if no protective regulations were incorporated. The discovery and penalizing of breaches of Conference resolutions has a rather lengthy history in shipping and rail transportation, but only the system adopted by the IATA Conferences will be considered here.

According to the present Provisions, any member or members of a Conference who believes that another member has violated a Conference agreement can demand the appointment of an investigatory commission. This commission, acting under the authority of the IATA Executive Committee, can settle its own procedure. Conference members are required, upon the request of the commission, to furnish it with any relevant information. The commission is then authorized to reach a decision based upon the issues and evidence placed before it and to impose upon any carrier found guilty of a breach of obligation certain penalties prescribed by the Annual General Meeting of IATA.

The carriers involved on either side of such a case have the right to appeal a commission decision within sixty days to the IATA Executive Committee. This group is given the final word in approving, disapproving, reducing or modifying the decision and penalty of the commission. When a case has been finally determined, a full report of the matter is to be circularized to all the members of the Conference concerned.

Although there has been little need for this procedure since its incorporation in the Provisions, its existence as a possible deterrent to breaches of Conference resolutions has a practical value.

Principles and their Affect on Rate Agreements

There are at least two basic principles on which a rate structure could be built:

(1) charging the highest rates that the traffic can bear;

(2) fixing rates in relation to reasonable cost and profit figures.

The first of these principles has been largely rejected in international air transport practice. While the emergent need for transportation and communications in the years immediately following the war made it possible for the airlines to increase their rates without losing custom, they did not avail themselves of it. Instead, with the encouragement of states and of international organizations, the carriers have concentrated upon improvements in efficiency and reductions in rates to make air transport services available to the broadest possible market.

The effort to bring rates into relationship with costs has been a process of continuous development. When the old North Atlantic Traffic Conference held its first meeting in February, 1946, it was found that no appropriate cost figures were available for rate-making purposes. It was then necessary to develop a standard form for collecting cost data, but the successful drafting of such a form was not in itself enough to assure their availability. In some cases, some of this data was considered as confidential from either a national or commercial point of view, and special procedures for its confidential disclosure and transmittal had to be developed. In others, the accounting procedures of the airlines themselves had to be expanded or changed to gather the information required.

It was recognized that routes were broadly divided into those which lay entirely inside the boundaries of a single Conference area and those which ran between points in two or more Conference areas — in brief, into intra-Conference and inter-Conference categories.

Since the majority of world routes break down into regional operations, with varying operating characteristics in each region, it was seen that intra-Conference routes must be further sub-divided.

It was decided that the costs of east-west inter-Conference routes would be based on the costs of the round-the-world trunk routes, even though these routes might not, in some cases, follow the exact trunk pattern. Further, since it was evident that carriers who operate only along one sector of the trunk routes were entitled to some voice in the determination of trunk rates, these main routes were divided into three sectors:

(i) North American to European gateways;
(ii) European gateways to Calcutta; and
(iii) Calcutta to the West Coast of North America.

To make cost reports consistent in all three Conference areas, differentiation had to be made between basic factors[22] and secondary considerations in airline operating costs, and it was recognized that there were still other considerations, which, while not entirely predictable, have an important influence on international air transport cost figures. These include such matters as grounding of equipment, delay in deliveries of new equipment, difficulties in obtaining spare parts, currency fluctuations, changes in wages and commodity prices, alterations in organizational structure, variations in anticipated available payload and other factors which had to be considered in cost calculations.

The Civil Aeronautics Board and the Ministry of Civil Aviation appear to be conscious guardians of the principle incorporated in the Bermuda Agreement that rates should be reasonable. The Civil Aeronautics Board's Order extending its approval of the IATA Conferences to February 28, 1950, gave detailed consideration to the rate-making process and to the character of the economic data relied upon by the Conference in reaching individual rate resolutions.

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[22] (a) The major operating factors are: the average number of aircraft, total flight hours (less non-revenue hours), net revenue flight hours, average speed, revenue kilometres (great circle kilometres, course flown), average saleable capacity for full period, saleable metric ton kilometres, flight equipment depreciation. The overall load factor for this purpose is the quotient obtained by dividing revenue ton kilometres flown by saleable ton kilometres.

(b) The elements of cost are: (1) Flying operations (crew salaries, expenses and insurance, fuel and oil, insurance, aircraft and public liability insurance, flight equipment rental); (2) Aircraft maintenance (direct labour, including labour expended in aircraft engine maintenance and repair, materials and outside repairs; overhead, including supervisory personnel and all other indirect expenses in operation and maintenance); (3) Depreciation of flight equipment; (4) Station and ground operation (landing charges, salaries, wages and expenses, other airport and station costs); (5) Passenger service (cabin attendants' salaries, expenses; passenger liability insurance, meals and accommodation); (6) Selling and publicity (agency commission, advertising and publicity); (7) Administrative and general office charges, salaries, expenses, fees; (8) Capital charges, including interest on debt, income taxes, amortization of development expenses and provision for profit.

The Council of ICAO, in accordance with the provisions of the Chicago Convention[23] approved Statistical Reporting Forms, specified as Table T.2 (Traffic Summary) and Table F.2 (Operating Summary), and the Civil Aeronautics Board requested that the rate resolutions reached at IATA Traffic Conferences be supported by the minimum information provided by these forms.

It is the opinion of the Board that "neither the members of IATA nor the reviewing agencies or their respective Governments can adequately appraise the economic soundness of rate resolutions except upon consideration of such minimum data." It might be suggested that one of the reasons which prompted the Civil Aeronautics Board's request to the carriers lies in the fact that many of the signatory countries to the Chicago Convention and members of ICAO had failed to provide the information on a governmental level.

Primary Questions before the Conferences

While the whole work of the IATA Traffic Conferences cannot be fully examined in the course of this study, it will be appropriate to touch upon the main headings with which they deal.

The most important issues before the Conferences are those of basic rates and specified fares. Rates for scheduled operations are agreed upon by resolution and are recognized as minimum, but not maximum rates.

These agreements are further complicated by the international character of the Traffic Conferences. Provisions relating to currency questions — in themselves too complicated for exploration here — must be introduced. "Conversion rates" must be established to make possible the translation of rates from the currency agreed upon in the first instance (in Conference No. 1, the United States dollar, and in Conference No. 2, the pound sterling) to the local currencies of the individual carriers. Since international carriers do business in more than one country, there must be provision for further recalculation of rates into other currencies, so that exchange rates must also be agreed upon by resolution. It has been necessary also to introduce some restrictions based upon current complications of international exchange: for example, non-residents of a country in which a ticket is sold must pay their fares either:

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[23] Art. 67 of the Chicago Convention contains the following important undertaking:

"Each contracting State undertakes that its international airlines shall, in accordance with requirements laid down by the Council, file with the Council traffic reports, cost statistics and financial statements showing among other things all receipts and the sources thereof."

According to Art. 54 of the Chicago Convention, one of the mandatory functions of the Council is:

"(i) Request, collect, examine and publish information relating to the advancement of air navigation and the operation of international air services, including information about the costs of operation and particulars of subsidies paid to airlines from public funds."

(a) in Portuguese escudos, Swiss francs or United States dollars;

(b) in the currency of the country of residence of the passenger (if not prohibited by law in the country of sale); or

(c) in the currency of the country of sale (with the exception of passengers residing in certain countries who must prove that the currency has been obtained at the official rate).

The only exceptions to the rates agreed in the "Specific Fares and Rates" resolutions are in connection with the round-trips, circle trips, open-jaw trips, excursion fares, free and reduced rate transportation for agents and tour conductors, privileges of stop-over, all of which are discounts, and sleeper surcharges, which call for increase in fare.

In addition to providing for specific rates and fares between certain points, it was foreseen that the carriers would have to establish other rates and fares. So that these unspecified rates would not, either alone or in combination with others, undercut the specific rates, certain precautions were taken. It was provided that unspecified rates would be constructed in conformity with existing Conference resolutions, that their validity would expire with the specific rate resolutions, and that the carrier wishing to establish such an unspecified rate must notify the Secretary of the Traffic Conference concerned in advance of such action.

The Conferences also agreed upon regulations for the construction of inter-Conference rates and for the adjustment of through rates to meet combinations of intermediate rates.

Inter-Conference rate construction is, under present resolutions, governed by the following two principles:

(a) establishing rates between specified gateways and adding to them the agreed Conference fares to and from such gateways; and

(b) establishment of through fares on the basis of a distance curve by agreement among the carriers concerned.

The carrier establishing inter-Conference rates may choose between these two principles.

Where there is a discrepancy between the through rate between two points and the combination of rates established for service via intermediate points, the Conference regulations provide that the through rate may be adjusted downward to the sum of the intermediate rates. Should such a reduction be necessary, however, thirty days' notice must be given to other Conference members before its introduction.

All of the arrangements so far mentioned apply to the scheduled operations of the carriers. In charter operations, they are left free to do as they please, with the exception of a safeguard against eventual rate-cutting through such charter operations. It has been agreed by the Conferences that all charter agreements must contain the stipulation that the party to whom the space is sold will not resell it to the general public for less than the IATA rate; that members will not undercut Conference rates by operating charter services; and finally, that charter prices charged by members will be calculated on a complete plane-load basis. Governments or government-sponsored organizations are, however, exempted from these regulations in the event the charter concerns the transportation of immigrants and displaced persons. Even in this case, however, the charter price must be calculated on a complete planeload basis.

In the construction of cargo rates, a distinction has been made between low density cargo, which has bulk, but little value, and cargo of particularly high value, which must be given special treatment. Quantity discounts, common to all other forms of transport, were introduced and agreed upon, as were commodity rates for high value cargo.

These are by no means a complete catalogue of the various kinds of rate resolutions, nor have those mentioned been fully explored. They will, however, give some idea of the complexity of the problems and procedures necessarily treated by the Conferences.

Date of Effectiveness of Rate Agreements

In reviewing the bilateral agreements, it was pointed out that the respective governments reserved the right to exercise a control over the rates the carriers sought to introduce. The mechanics of the Conferences have been seriously affected by this requirement, especially in the light of the Conference rule that no carrier is bound by a resolution if its government disapproves it, or if it is against its national policy.

The purpose of the Conference method is to achieve resolutions which can be subscribed to by all the participating carriers and which are effective and binding on all the members. This aim might be seriously endangered by the facts:

(a) that there is no definite time limit set or agreed by the governments for the expression of their approval or disapproval; and

(b) that, since it is quite natural that no carrier is willing to make an agreement effective unless reasonably certain that the others will be able to get their government's approval to do the same, a rate cannot be announced as

effective before all governments concerned have approved the resolution.

This serious question of the effective date of Conference resolutions is further complicated by the different concepts of European and United States carriers concerning public policy.

United States carriers took the position that their government agency cannot be limited in its action and that every agreement reached by the Conferences could be adopted only "subject to government approval." On the contrary, the European carriers felt that such an expression would render Conference work ineffective, as governments may not express their opinion regarding an agreement in any reasonable time, and they continued the practice of prescribing a date of effectiveness of their resolutions prior to which any government might express its approval or disapproval.

At Rio de Janeiro, where the first composite meeting of the three Traffic Conferences was held in 1947, the opposing viewpoints were brought into sharper focus. It was contended that practical operating experience demonstrated that it was a most undesirable arrangement to make agreements come into effect at an indefinite date in the future. The only practical and realistic approach to the problem, it was argued, was to arrange that agreements affecting the business of air transportation would come into effect at a definite date, as close to the time of agreement as possible.

The record of government action in passing upon IATA resolutions appeared not to have been satisfactory. Sometimes delay was occasioned by one government and sometimes by another, but, in each case, operators suffered the cumulative effect of such delay.

A compromise was finally reached in Rio de Janeiro, which provided that:

(1) Pure rate resolutions were to continue to be "subject to Government approval."
(2) Mixed resolutions related to rates were to come into effect on a specified date, allowing governments a reasonable period of time in which to approve or disapprove the resolutions before they became effective.
(3) Non-rate resolutions were to come into effect immediately.

This arrangement appeared only to be a partial solution and in 1948 at the Bermuda meeting of the Conferences, the question was considered again. It was agreed there to deviate from the three-fold distinction between different subjects and to adopt a uniform procedure for determining the dates of effectiveness of all kinds of agreements.

Generally, the resolutions with respect to effective date provide that the carriers are responsible for obtaining their governments' approval

of agreements within a forty-five day period immediately following December 31, 1948 (filing period); that, if during the filing period the respective government neither expressed itself nor requested an extension of the filing period, the machinery would start moving and the announcement and effectiveness dates would be specified by the secretaries of the Traffic Conferences. The announcement date was set at fifteen days following the date of this notification by the Conference secretary and it was agreed that no member would publicly announce the arrangements made by the agreement before that time. The effective date of the agreement is set at forty-five days after the date of notification. There is also provision for the length of time the respective agreements are to remain effective.

There are, however, differences in the way these effectiveness resolutions anticipate the disapproval of a resolution by governments. The various treatments of this question are:

(a) certain agreements, including the one regulating the effectiveness of resolutions, were made void if disapproved by any government authority;

(b) certain agreements, although declared to be void if wholly or partly disapproved by a government (thus giving rise to the same open-rate situation which would exist if there were no resolution at all), leave Conference members individually free to put the provision of the agreement into effect, subject to the laws of the countries in which they operate;

(c) one resolution is not voided by the disapproval of a government and can be implemented by all carriers whose governments have not disapproved, provided that it is not applied in a country which has disapproved it;

(d) the agreement covering specific Fares and Rates received special treatment: if any of the fares, or rates or charges set forth (in the resolution) "is disapproved by government authority, the *fares, rates or charges* disapproved shall be ineffective and an open situation shall exist with respect to such fares, rates or charges."

A period of validity is set for every agreement. Some resolutions may be effective for only a few months, while others can be valid for longer terms, depending upon their nature and circumstances.

The Civil Aeronautics Board in Agreement CAB No. 493, made it a condition that no resolution relating to rates for periods extending beyond the period of approval of that agreement would be approved by the Board. It has been also said by the Civil Aeronautics Board that "the right of independent action of any carrier once it has observed the Conference procedures must be "scrupulously preserved."

Relation Between IATA and the Traffic Conferences

The foregoing illustrates some of the problems before the Traffic Conferences. There remains only to consider the relation between IATA, the association, and the IATA Traffic Conferences as autonomous bodies.

The ties between IATA and the Conferences are these:

(1) the authority of the Conferences is derived from the General Meeting of IATA.

(2) Membership in the Traffic Conference is contemporaneous only with membership in IATA.

(3) The provisions for the regulation and conduct of the Conferences are established by the Executive Committee of IATA and amendments to these provisions are left to the Executive Committee.

(4) In the case of alleged breaches of agreements by members of the Conferences, the Director General of IATA has the power to refer the matter to a commission, and to appoint the commission from a panel established by the authority of the IATA Executive Committee. The decision and action taken by the Commission will be reported to the Director General. Appeal against the decision of the Commission will be made to the IATA Executive Committee.

(5) The budgets of the Traffic Conferences must have the approval of the IATA Executive Committee, and the Traffic Conferences have no power to alter the budget after it has been so approved without obtaining the endorsement of the proposed alteration by the Executive Committee.

(6) The Secretaries and staff of the Traffic Conferences are employees of IATA, independent of any of the members of IATA.

In considering the relationship between the Association and the Conferences, it must be borne in mind that most of the problems of international air traffic are worldwide in scope, if only for the reason that the route structure of international air traffic is now worldwide. If this system is to function efficiently, fares must be quoted in universally understood terms, provision must be made for the settlement of interline transactions no matter where they are made, and the policy under which carriers accept passengers or cargo must be coordinated throughout the flight. In all of these matters, not only the individual Conferences but many departments of the airlines which did not participate directly in the Conference work are heavily involved. To deal with these problems as they affect them, the Conferences need not only composite meetings, but the harmonized assistance and consultation of legal and financial experts of the airlines.

While IATA, the association, has many functions independent of the Conferences, it presents a practicable and efficient machinery for such coordination. The authority of the Conferences is thus derived from a body – the General Meeting of IATA – in which all members of all Conferences are represented. The Executive Committee of IATA, to whom amending powers over the constitution of Conferences are granted, is confirmed in office, and subject to the policies laid down by the General Meeting.

The limitation upon the power to amend the basic laws of social organisms is a well established principle of constitutional law. Its purpose is to make sure that the primary rules of the organization cannot be altered to suit purely political and transitory ends, and the provision that the Executive Committee of IATA must approve alterations to regulations of the Conferences constitutes this sort of safeguard.

The provision that membership in the Conferences is contemporaneous with membership in IATA is an expression of this duality: it is hardly conceivable that an airline would wish to participate in a Conference administered by a body in whose policies it did not have a voice.

It should be borne in mind at the same time that membership in IATA and in the Conferences is not exclusive. The doors of both are open to all carriers, subject only to the requirement that they must be air transport enterprises operating a scheduled air service under proper authority in the transport of passengers, mail or cargo for public hire between the territories of two or more states and that they must have that authority from a state eligible for membership in the International Civil Aviation Organization. In brief, it is the state which determines the eligibility of an airline to membership in IATA and the Conferences.

The procedures established for the settlement of alleged breaches are an attempt to take arbitral matters at least one step out of the cockpit of Conference routine. The commission which is provided to look into such allegations is named by the Director General of IATA, not necessarily as an official of the Association, but as an impartial person having no relation to the parties. The authority of the Executive Committee to act as final tribunal creates only such relationship as the authority of any other arbitral tribunal would and extends no control over the Conferences to this Committee.

The provisions for centralized preparation of the budget and the personnel of the Conferences are precautions to assure the absolute impartiality of the Conference administration, who call the meetings, prepare the agenda and write the minutes.

The autonomy of the Conferences *vis a vis* IATA is positively assured by certain measures which give them the full control of their meetings and their agenda:

(i) one-third of the voting members of a Conference have the right to request the Secretary to call a meeting;

(ii) no matters can be placed upon the agenda of a Conference unless they have been notified to all members thirty days in advance of the meeting, and business which is not so notified in advance can be acted upon only by unanimous consent of all Conference members.

Finally, whatever administrative functions in connection with the Conferences may be assigned to the Executive Committee, the Director General of IATA, or the Conference Secretaries, they have neither direct control over the meetings, nor the right to vote upon resolutions.

Conclusion

From a consideration of the Conferences, of their rules, procedures and activities, these salient features stand forth:

(i) they provide the utmost precautions against possible trust activities by the carriers because each carrier has full right to participate and express his views and to cast *one* vote; because any carrier may veto any agreement which is against its interest (and thereby prevent other carriers from entering into it); and because carriers may be bound only by actions taken in meeting and in the form of a resolution, no outside compacts or agreements in minutes being binding;

(ii) they assure effective compliance with national laws, regulations and controls. Every government may disapprove a rate detrimental to the interests of its own citizens, thereby voiding wholly or in part the Conference resolutions concerned, and no carrier may be bound by an agreement which would require it to contravene the laws of its own state;

(iii) they offer definite guarantees against discrimination, in that qualification for membership is not left to carriers already members of the Conferences, but to governments;

(iv) they are committed to the principle laid down in the Bermuda Agreement and reiterated in the subsequent Anglo-American declaration, and incorporated in the bilateral agreements — to endeavor to give the public cheaper transport rates by bringing their charges into relationship with costs.

This discussion of the rules and procedures of the Traffic Conferences of the airlines has concentrated on the operation of their rate-making machinery because of the express references to them in the many bilateral agreements.

Because of the many issues involved in these agreements, it is difficult to draw hard and fast conclusions regarding them. Nevertheless it

is submitted that, insofar as rates are concerned, the bilateral air transport agreements have established a uniform framework for making reasonable rates, have set up within it a system of more or less universally recognized Traffic Conference machinery by which carriers can agree upon rates, have given governments the right to control carriers' rate agreements in the public interest, and have, in most cases, provided for arbitration of disputes.

Undoubtedly, there will always be divergencies and difficulties in the rate-making field. The present system, however, provides a means whereby these can be reconciled and resolved within the operators' Conferences and without the constant danger of resort to expensive and destructive rate wars.

It is interesting to note that, while the present structure was created almost incidentally by the Bermuda Agreement in 1946, it has been so reinforced by subsequent bilateral agreements that it represents today a worldwide network in which great confidence has been placed by all parties concerned. The present machinery can be improved, and undoubtedly will be as time goes on. Yet, as it stands, it offers a guarantee that the carrier will not be forced into uneconomic operation and that the public will not be exploited.

EDITORIAL

AIR LAW, RESEARCH AND THE UNIVERSITY

WITH the vast technical progress in airplane design and all-weather navigation that resulted from the impetus of war, it is now the *legal, economic,* and *political* problems that retard the fastest and fullest fruition of this Air Age. "The airplane is part of the modern environment of life," noted the United States Supreme Court in 1946.[1]

Only last year, the highest Court first took official cognizance [2] of the unique character of air transportation:

> "Of course, air transportation, water transportation, rail transportation, and motor transportation all have a kinship in that all are forms of transportation and their common features of public carriage for hire may be amenable to kindred regulations. But these resemblances must not blind us to the fact that legally, as well as literally, air commerce, whether at home or abroad, soared into a different realm than any that had gone before . . .
>
> "A way of travel which quickly escapes the bounds of local regulative competence called for a more penetrating, uniform, and exclusive regulation by the nation than had been thought appropriate for the more easily controlled commerce of the past . . .
>
> "However useful parallels with older forms of transit may be in adjudicating private rights, we see no reason why the efforts of the Congress to foster and regulate development of a revolutionary commerce that operates in three dimensions should be judicially circumscribed with analogies taken over from two-dimensions transit." [3]

Lawyers, executives, and public servants must meet this challenge if America is to remain a great world power. Winston Churchill recognized aviation as one of the significant forces of the Twentieth Century

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[1] *United States* v. *Causby,* 328 U.S. 256 (1946). This case dealt with the invasion of private property by low flying aircraft. The Court said: "It is ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*Cujus est solum ejus est usque ad coelum.* But that doctrine has no place in the modern world. The air is a public highway, as Congress had declared. Were that not true, every transcontinental flight would subject the operator to countless trespass suits. Common sense revolts at the idea."

[2] *Chicago & Southern Air Lines, Inc.* v. *Waterman Steamship Corp.,* 333 U.S. 103 (1948).

[3] On April 18, 1949, the Supreme Court, in *TWA* v. *CAB,* 336 U.S. 601, came to grips with certain fundamentals of public utility rate-making in deciding TWA's petition for a "retroactive" air mail rate.

A majority of the Court rejected TWA's contention which it found would transform the 1938 Act into a "cost-plus system of regulation" and found the "apparent design of the Act" was to promote the "sound development of an air transportation system through competition" by the CAB setting uniform mail rates for classes of air carriers which would force them "to compete in securing revenue and in reducing or controlling costs."

The consistency of the CAB order of February 29, 1949, granting TWA mail rate increases for losses sustained by grounding of the Constellation aircraft in 1946 was questioned by the dissent.

in his address at Massachusetts Institute of Technology on March 31, 1949:

> "We thought that with improving transportation nations would get to know each other better. We believed that as they got to know each other better they would like each other more and that national rivalries would fade in a growing international consciousness . . .
>
> "Humanity was informed that it could make machines that would fly through the air . . . The conquest of the air and the perfection of the art of flying fulfilled the dream which for thousands of years has glittered in human imagination. Certainly it was a marvelous and romantic event.
>
> "Whether the bestowal of this gift upon an immature civilization . . . was a blessing or a curse has yet to be proved. On the whole, I remain an optimist . . . This is a memorable milestone in the march of Man . . .
>
> ". . . Fanned by the crimson wings of war, the conquest of the air affected profoundly human affairs . . . The human biped was able to travel about far more quickly. This greatly reduced the size of his estate, while at the same time creating an even keener sense of its exploitable value."

Northwestern University early accepted the challenge of the impact of aviation upon the evolution of modern law and society, founding an Air Law Institute in 1929 and beginning publication of the JOURNAL OF AIR LAW in January, 1930, Dean John H. Wigmore wrote in the first issue:

> "In the course of legal history, new economic and social activities have from time to time found the Law not prepared with developed rules to fit patly the new needs for definition of rights. And naturally so, for Law is based on Experience . . .
>
> "Again, today, we are confronted with a new, and this time a vaster, field for the definition of legal rights—Rights in the Air. Again we are faced with the prospect of a long period of fumbling and error . . .
>
> "The conditions for success, we believe, are, first, an early exchange of experiences. Such is the service which the Air Law Institute and the Air Law Journal aim to render, *viz.*, to furnish a clearinghouse for experiences."

Recognition in 1939 of the intimate relationship between economic and social forces and Law resulted in a change of name to the present JOURNAL OF AIR LAW AND COMMERCE, with the School of Commerce participating. Gradually acquiring increased stature, the JOURNAL grew with American civil aviation as aircraft dissolved time and surface obstacles, extended and quickened our industrial activities, our markets, recreational areas, affected urban planning and our daily lives in hundreds of ways. The JOURNAL's pages reflect that remarkable development. Exigencies of war compelled suspension of publication, but after a four year hiatus Volume 14 Number 1 appeared in January of 1947. The JOURNAL OF AIR LAW AND COMMERCE is now published as a 128 page quarterly with the aid of several devoted voluntary depart-

mental editors – in less than three years it has earned full recognition both for scholarship and practicality from leaders in industry, government, law, economics, and university research. It features:

Leading Articles—definitive analytical studies of current problems;
Editorials—on timely subjects;
Quarterly Reviews of Regulatory Activities:
International—digest of ICAO and IATA work, significant documents;
Federal—documents of national importance, summary of activities of administrative agencies;
State and Local—NASAO proceedings, legislation and regulation;
Judicial and Regulatory Decisions—student notes on selected decisions of courts and administrative tribunals;
Book Reviews—new books of economic and legal significance to aviation;
Bibliography—list of current important aviation literature.

Recognized experts in government and industry all over the world have contributed to the current stature of the JOURNAL, and their continued contributions and cooperation are earnestly sought. Leading articles in the post-war issues of the JOURNAL comprise the finest compilation extant of authoritative and readable studies on current questions before commercial carriers, government officials, manufacturers, and airport operators.

In addition, Northwestern Law School offers a seminar in Transportation Law, organized by the Editor of the JOURNAL, a course focussed on the volatile route, rate, subsidy and operating problems of modern air transport and a comparison with government regulation in surface shipping. As part of the JOURNAL research and teaching program, an unexcelled library of books, periodicals and documents is being acquired. Considerable foreign material has been secured. The Law School has been designated as one of the university depositories for all publications and documents of the International Civil Aviation Organization. Northwestern Law School now possesses one of the most complete non-technical aviation libraries in the midwest. Its aviation program is coordinated with that of the Commerce School, which offers a number of directly related courses. Together the Schools offer valuable facilities for individual student and graduate research and publication.

Northwestern's Chicago campus is a logical center for such legal and economic research. Chicago is a great transportation hub and its municipal airport is one of the busiest commercial fields in the country. While most aviation regulation originates with the CAB and CAA in Washington, it has been found advantageous to maintain a vantage point in touch with, but not under the dominance of, government agencies.

Since the JOURNAL was launched some 15 years ago, Northwestern University has won international recognition as an academic focal point of aviation law research in the United States. It has given graduate stu-

dents the special training which has enabled them to make contributions to both government and industry. It has helped and encouraged other institutions to initiate similar projects in air transportation.

The JOURNAL's enthusiastic acclaim by all segments of aviation indicates the need for such a scholarly and independent English language publication of legal and economic studies on this rapidly growing transport medium. Yet, there are some signs that the JOURNAL has progressed almost as far as it is likely to go under the *ad hoc* financing by general funds of the University, arrangements which have prevailed since exhaustion of the original grants drastically reduced the activities of the Air Law Institute in the mid-thirties. Some more stable and comprehensive program would be desirable if Northwestern University is to continue to make substantial contributions to United States air law and transport policy.

The Argentine government is developing its National Institute of Air Law, and a distinguished group of private citizens in Paris has been guiding the French Institute of Air Transport in a large non-profit research program. It may well be that the time has come for airline and aircraft industry executives, lawyers, university staff, public servants, and other Americans interested in continuing our leadership in the airways to consider the many benefits of an Aviation Law and Research Foundation and the possibilities of instituting a similar long range program for studies and publications on aviation law and economics in the United States.

EDWARD C. SWEENEY

INTERNATIONAL

Department Editor: Joan H. Stacy*

INTERNATIONAL CIVIL AVIATION ORGANIZATION (ICAO)

I. Introduction

THE work of ICAO during the second quarter of 1949 was characterized by the many different meetings held. Not only was there a session of the Council and its subsidiary bodies, the Air Navigation Commission and the Air Transport Committee, but also an annual Assembly of all Member States, a session of the Legal Committee, and a group of conferences on joint financing and operation of air navigation services and facilities. There were three regional meetings—one full scale meeting on the African-Indian Ocean Region[1] and two regional communications meetings.[2] A special NOTAM meeting was held at headquarters in Montreal from April 14 to May 12 to develop standard procedures for the dissemination of aeronautical information.

II. London Conferences on Joint Financing and Operation of Air Navigation Services

Three ICAO conferences were held in London April 20 to May 12 on the problem of joint financing and operation of essential international air navigation facilities and services. In accordance with the renewal terms of the International Agreement on North Atlantic Ocean Weather Observation Stations concluded in September 1946,[3] the Second Conference on ICAO North Atlantic Ocean Stations was convened to consider continued operation and technical problems of the ocean stations. It was decided that only 10 instead of 13 of these stations, as provided for in the 1946 agreement, were essential to safe and efficient operation of international air services across the North Atlantic, and arrangements were made for the reallocation of the participating States' responsibilities.

Under the new agreement,[4] the United States, which has a major portion of the scheduled airline traffic across the North Atlantic, will be responsible for operating 14 out of a total of 25 ships manning the 10 stations. The United Kingdom, France, Canada, the Netherlands, and Norway will operate the other ships, with Belgium, Denmark, Sweden, Ireland, and Portugal making financial contributions to the partial cost of operating certain of the ships. The agreement will come into force as soon as States responsible for the operation of a total of 18 or more ships have deposited their instruments of acceptance with ICAO and will be effective until June 30, 1953.

The ICAO Council is not a party to this international arrangement because Chapter XV of the Chicago Convention does not provide for joint support through ICAO in areas of undetermined sovereignty. The Council,

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* Divisional Assistant, Aviation Division, Department of State.

[1] African-Indian Ocean Regional Air Navigation Meeting held in London March 22 to April 12, 1949.

[2] Special North Atlantic Meteorological-Telecommunications Meeting held in London April 11 to April 14, 1949 and second session of European-Mediterranean Frequency Meeting held in Paris April 26 to May 14, 1949.

[3] Report of the Conference of the North Atlantic States on the Ocean Weather Observation Stations in the North Atlantic, ICAO Doc. 2668-C/313, November 1946.

[4] Agreement on North Atlantic Ocean Weather Stations, ICAO Doc. 6753, London, May 12, 1949.

however, on June 3 accepted certain administrative responsibilities in connection with the Agreement.

The London Conference on Air Navigation Services: Greenland and the Faroes resulted in an arrangement for the joint support by ICAO Member States of air navigation services and facilities in Danish territory similar to the one concluded in June 1948 with regard to international services and facilities in Iceland. Under the terms of the Final Act[5] of the Conference signed May 12, 1949, Denmark is to be reimbursed by ICAO Member States for 90% of the cost of past, current, and future maintenance and operation of the services and facilities in Greenland and 95% of the cost of maintaining and operating the Skuvanes (Faroe Islands) station of the Northeast Atlantic Loran Chain.[6] The ICAO Council in June 1949 concluded the requisite agreement with the Government of Denmark and passed the resolution required under the terms of the Final Act whereby it will assess nine different ICAO Member States[7] according to proportionate benefits received from the international services and facilities.

Under this new arrangement for the joint support of air navigation services in Greenland and the Faroes, the United States will contribute between 50 and 60% of the sum reimbursed to Denmark by ICAO Member States for the retroactive period ending December 31, 1949 and the calendar year 1950. The arrangement will become effective upon receipt by the ICAO Council of consents from States whose assessments total not less than 80% of all assessments for the period ending December 31, 1949.

The 10 states[8] that met at the London Conference on Air Navigation Services: Greece were not of one mind of the manner and extent to which facilities and services at Ellinikon Airport, Athens and certain other international airports in Greece should be financed through ICAO. The Conference, after examination of the report of the three-man ICAO mission to Greece in March 1949 and other documents submitted, concluded that somewhere between $600,000 and $2,750,000, depending on the requirements of the different user nations, were needed from sources outside the country to finance essential international air navigation services and facilities in Greece. It therefore recommended that the ICAO Council contact all States potentially interested in the project; determine what assessments, if any, they would be willing to accept; and decide, on the basis of replies received, what action should be taken. The London Conference further recommended that, if a joint support project is determined to be feasible, any agreement concluded between the Council and the Government of Greece should specify a percentage of the revenues from Ellinikon Airport to be used to amortize the capital investment of contributing States. The ICAO Council is expected to take action on the Greek project at its eighth session in the fall of 1949.

III. Seventh Session of the Council and Work of the Air Navigation Commission and Air Transport Committee

The seventh session of the ICAO Council, May 17-June 24, was necessarily interrupted during the two-week period of the annual Assembly in

[5] Final Act of ICAO Conference on Air Navigation Services: Greenland and Faroe Islands, ICAO Doc. 6755, London, May 12, 1949.

[6] An arrangement for joint support through ICAO of the Vik (Iceland) station of the Northeast Atlantic Loran Chain has been in effect since 1947.

[7] Belgium, Canada, France, Iceland, the Netherlands, Norway, Sweden, the United Kingdom, and the United States.

[8] Belgium, Denmark, France, Greece, Italy, the Netherlands, Sweden, Turkey, the United Kingdom, and the United States.

the early part of June. As was to be expected, much time was devoted at Council meetings prior to the Assembly to recommendations to the latter body and at the few Council meetings after the Assembly to carrying out Assembly directives.

The most important achievement in the air navigation field during the seventh session was the adoption by the Council on May 30 of Annex 10 to the Chicago Convention, Standards and Recommended Practices for Aeronautical Telecommunications. These standards and recommended practices include material prepared by both the Special Radio Technical (COT) Division in November 1946 and the Communications (COM) Division in January 1949. Additional COM material will be added to the Annex later through a series of amendments. The following dates were established by the Council with regard to the standards and recommended practices now included in Annex 10:

Date by which States to Register Disapproval	*Date by which States to Notify Differences*	*Date of Coming into Force*
March 1, 1950	April 1, 1950	April 1, 1950

Another important accomplishment during the Seventh Session of the Council was the consolidation of the results of the various regional frequency conferences into a draft frequency allotment plan covering the international air services of ICAO Member States. This plan was prepared for submission to the second session of the International Administrative Aeronautical Radio Conference (IAARC) of the International Telecommunications Union (ITU) held in the summer of 1949.

The Air Navigation Commission, which did not adjourn in April along with the Council and the Air Transport Committee but was in continuous session from February 7 through June 15, produced a first draft of the Standards and Recommended Practices for Aerodromes and Ground Aids. The Commission also agreed to the revision and addition of new material to the draft Annex on Search and Rescue.

Both the Commission and the Council completed action on the Final Reports of the 1949 sessions of the Communications, Operations, and Airworthiness Divisions and the Final Reports of the African-Indian Ocean Regional Air Navigation, Special North Atlantic Meteorological Telecommunications, and Special NOTAM Meetings.

In connection with ICAO's Aviation Training Program, the Commission and the Council approved the setting aside of $5,000 for the production of a few experimental film strips illustrating ICAO regulations and procedures. The Council at the end of May also directed that the Organization avail itself of advisory assistance on audio-visual aids offered by the United States and other national or international authorities.

Of greater potential importance, although not yet reviewed by the Council, were the proposals submitted by the ICAO Secretariat to the UN's Administrative Committee on Coordination. These proposals, submitted for discussion at the July 1949 session of the Economic and Social Council, cover an ICAO program for air transport surveys, technical assistance on design, construction and installation of air navigation facilities, technical advice on operational standards and organization, and training of aviation personnel. A budget of approximately $500,000 has been proposed for the first year of operation of this ICAO program for rendering technical assistance to underdeveloped areas.

The Air Transport Committee, which held its seventh session during approximately the same period as the seventh session of the Council, considered the legal and administrative problems involved in the application of

the Chicago Convention's provisions relating to nationality of aircraft operated by international operating agencies. The Committee concluded that no special problems arose as long as international operating agencies registered their aircraft nationally, according to the present practice of international airlines. The Secretariat was requested to prepare additional material for discussion by the Committee on problems involved when international agencies do not wish to register their aircraft nationally.

The Committee and the Council approved a report to ICAO Member States pursuant to Resolution A2-19 of the Second ICAO Assembly on national practices with regard to treatment of scheduled and non-scheduled air services. The Council decided to postpone from June 30 to October 31 the deadline for submission by States of their views on the important question of conclusion of a multilateral air transport agreement.

The Committee approved for study a list of policy questions on user charges for international air navigation facilities and agreed to discuss at its fall 1949 session methods of assessing and levels of airport charges and the general problem of whether or not there should be charges for other types of air navigation facilities. Also planned for the Committee's fall work program is a discussion of the effect of multiple taxation on international air transport.

IV. Third Assembly

The Third ICAO Assembly, held in Montreal June 7-20, was a small one, with the agenda limited to financial and administrative questions in accordance with a resolution of the Second Assembly. Some 35 out of a total 54 ICAO Member States were represented, including Cuba and Israel whose membership in the Organization was not effective when the Assembly opened[9] but who were invited to attend. An Executive Committee, a Credentials Committee, a Committee on Rules of Procedure, and an Administrative Commission were established and the following officers were elected:

Sadar Malik, India, President of the Assembly;
Col. H. Delgado, Portugal, Vice President;
Brigadier General Hugo da Cunha Machado, Brazil, Vice President;
Ali Fuad Bey, Iraq, Vice President.

With economy as its keynote, the Assembly reduced by $261,000 the budget figure for 1950 of $3,198,607, which had been recommended by the Council. In making this lump sum reduction, the Assembly did not specify where the cuts were to be made but merely suggested that savings might be effected by combining and postponing certain meetings and by freezing the Secretariat at its present level. It was emphasized that the work of the Organization would undoubtedly be slowed down.

The voting power in the Assembly was suspended of 6 States which were in arrears of their dues for more than 2 years.[10] The Council was directed to take up the matter of non-payment of contributions with defaulting States, to review the principles on which contributions are based, and to make recommendations on both these problems to the Fourth Assembly. The Secretary General, in consultation with the President, was authorized to accept a portion of Member States' contributions for 1950 in currencies other than dollars.

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[9] Cuba became a member of ICAO on June 10 after withdrawing on May 11 its previous reservation to Article 5 of the Chicago Convention. Israel became a member of ICAO on June 23 after depositing its notification of adherence to the Convention on May 24.

[10] Voting power in the Council and its subsidiary bodies was also suspended, but since the six States are not Council members this action was more to establish a principle than to accomplish a practical objective.

Since on May 27 the Council had voted to revise as of July 1, 1950 its present system of deductions in lieu of income tax in line with the UN staff assessment plan, the Assembly agreed to the transfer to the general fund of the money accumulated through deductions in lieu of income tax. The Assembly also approved the Organization's participation in the United Nations Joint Staff Pension Scheme, with provision for the crediting of employees' services as from March 1, 1948 and for permissive participation in respect of services before that date.

The Third Assembly recommended that the Council study the possibility of holding the Fourth Assembly, which will be a full scale one, outside Montreal and that it bear in mind the invitation of Argentina to hold it in Buenos Aires in conjunction with the second South American, South Atlantic, and Caribbean Regional Air Navigation Meetings.

V. Fourth Session of the Legal Committee

The fourth session of the ICAO Legal Committee was held at the same time and place as the Assembly, June 7-18 at Montreal. Twenty-one ICAO Member States, one observer nation, and 7 international organizations were represented, and the following officers were elected:

Dr. E. M. Loaeza, Mexico, Chairman;
Mr. L. Clerc, Switzerland, 1st Vice-Chairman;
Mr. H. W. Poulton, Australia, 2nd Vice-Chairman.

The Committee was aided in its work by 4 of its permanent subcommittees: the Subcommittees on the Warsaw and Rome Conventions and on Definitions, which began work on June 1, and the Subcommittee on Search, Assistance and Rescue, which was convened for one meeting on June 16.

On the matter of revising the limits of liability of the Warsaw Convention, the Committee, after discussion and consideration of replies from ICAO Member States to a questionnaire on the subject, voted *against* the following proposed changes:

100% increase for limits of liability with respect to bodily injury when death does not result;
25% increase for limits of liability with respect to bodily injury when death not result;
100% increase for limits of liability with respect to death or permanent total disability;
25% increase for limits of liability with respect to death or permanent total disability.

The Committee requested the ICAO Council to send a report on the results of this discussion to ICAO Member States along with a request for their further views on the need for revising the limits of liability. Before it adjourned in the latter part of June, the Seventh Session of the Council agreed to an October 1, 1949 deadline for receipt of States' replies.

The Committee and its appropriate subcommittee also had under consideration the revision of the limits of liability of the Rome Convention. Replies to the questionnaire previously circulated to ICAO Member States differed greatly, and none of the proposed solutions obtained a majority vote of the Committee. A proposal was made that aircraft be classified into groups by weight and limits assigned to each group. The Council later set October 1, 1949 as the date by which ICAO Member States are to express their opinions on alternative limits of liability suggested by the Committee.

The Sub-Committee on Definitions noted with approval the progress made by ICAO in achieving uniformity of definitions and terminology. The Sub-Committee on Search, Assistance, and Rescue, after examining replies from ICAO Member States to a third questionnaire, concluded that the

major problem with which it was concerned was that of remuneration between States for search and rescue operations rather than between individuals so that the Brussels Convention, a private air law document, could not be used as a basis of solution. The Legal Committee endorsed the Sub-Committee's recommendation that it again take up the matter of remuneration for search and rescue after the Council reached a decision on the basic policy to be followed under Article 25 of the Chicago Convention.

The *ad hoc* Sub-Committee on Insurance decided that preparation of a draft international convention on aviation insurance is not necessary or appropriate at this time. The Legal Committee adjourned after recommending that its next session, the fifth, be held in January 1950 in Europe.

JOAN H. STACY

INTERNATIONAL AIR TRANSPORT ASSOCIATION (IATA)

TRAFFIC MATTERS

THE commercial pattern of international airline activity for the 1949-50 winter season was set by the composite sessions at Nice during May of the three IATA Traffic Conferences. Their conclusions were summed up in a series of 65 unanimous resolutions which will become effective on October 1, 1949, if interested governments approve.

Generally speaking, there will be no radical changes in passenger fares or cargo rates, despite rising costs to the airlines. On some Middle Eastern routes, rates will actually be reduced, while the Conferences provided for a greater flexibility in airline commercial policy which will permit various types of traffic-building fares to promote travel during slack periods. Reductions of from 35 to 50 per cent for school children and students in some parts of the world were also voted.

A special Winter transatlantic fare based on a $466, 60-day round trip between New York and London was recommended by the Conferences, to become effective October 1 for six months. This effects a substantial reduction in the regular season rate of $630 and is less than half of the transatlantic fare in 1944.

The question of tourist class transport at reduced rates will be considered as a worldwide problem by the next meeting of the Conferences at Mexico City in November. Studies now under way will also take into account the possibility of creating several levels of fares to apply to differing types of aircraft.

The necessity for more flexibility in the airline cargo rate structure was recognized by the Conferences and boards have been created to survey the rate levels for specific commodities. Considerable reductions for bulk shipments across the Atlantic were also provided.

Active work has now begun on the preparation of Consolidated Rules Tariffs by IATA on behalf of its members. These tariffs will be largely based upon the IATA Conditions of Carriage as adopted by the IATA Traffic Conferences as recommended practices for members.

TECHNICAL MATTERS

The Annual IATA Technical Conference, held at Burgenstock, Switzerland, during May, developed a threefold aim for the joint efforts of the technical departments of member airlines for the coming year: to increase reliability of service through surer traffic controls and better navigation and landing aids; to prepare for the coming into service of newer, heavier and faster aircraft on major world routes; and, by further standardization and

simplification to increase efficiency, reduce misunderstanding and hazard, and cut operating costs.

Principal recommendations of the various working groups of the Conference included the following:

The Conference urged upon ICAO new rationalized performance requirements for large and small transport aircraft to eliminate hidden margins which sacrifice payload without affecting safety. IATA members will carry out flight tests of such rationalized requirements and report results to a special ICAO meeting in 1950.

On the grounds that new developments in landing aids have outmoded the old idea of strictly visual weather ceilings, the Conference asked ICAO to change both the concept and detail of present regulations. It advocated the use of the "critical height"—the height above the aerodrome elevation at which the instrument approach should be discontinued if visual reference is not established.

The Conference urged installation of approach lighting systems at a total of 1400 international airports, only 300 of which are now so equipped. While it felt that standardization on a single system was not yet advisable, it endorsed either left side-line or center line systems for low intensity approach lights for night landings, and the slope line and Calvert (dash and cross bar) systems for high intensity, bad weather approach systems.

Early implementation by ICAO of a regulation calling for a 500-foot separation between air traffic levels was also voted and, as a supplement, the Conference endorsed the eventual use of a flight level indicator instrument in the cockpits of airline planes.

The Conference also worked out details of standardization between airlines of aircraft pipeline code colors and symbols; external couplings on planes; towbar fittings for vehicles used to handle aircraft on the ground; and for the format of maintenance manuals supplied to airline mechanics by manufacturers.

Problems involved in the operation of new high speed and high altitude aircraft operations were also treated at length. Because aircraft are now literally flying off the map with present aeronautical charts, governments were asked to create a new series of 34 route charts covering all major world routes on a scale of 1 to 2,000,000. Ground handling problems posed by double-deck and jet-propelled transports were discussed. The Conference also sent to ICAO and the International Meteorological Organization a summary of its discussions of the stratospheric weather reporting needs of new high-altitude aircraft.

Reports on methods of evaluating aircrew performance, the use of helicopters in scheduled transport, on instrument approach and navigation systems and on the maintenance, servicing and loading problems of the Berlin Air Lift were presented to the Conference. A special feature was a nose-to-tail symposium discussion on the maintenance and operation of DC-6 aircraft, in which airline engineers joined with those of the manufacturers.

The next IATA Technical Conference will be held in the United States in 1950.

FACILITATION

In order to intensify IATA's cooperation with ICAO in the latter organization's drive to obtain adoption by member States of its new Facilitation recommendations, a special Facilitation Office has been created and Facilitation representatives designated among member airlines. These representatives will take the responsibility for assisting individual governments in

their consideration of the new recommendations for minimum border requirements and explaining the interests of the carriers and the public in them.

PUBLIC RELATIONS

Development of an industry-wide approach in the public relations activity of the international airlines was stressed in the IATA Public Relations Conference at Oslo, Norway, from May 11 to 13. The sessions were attended by representatives of 22 airlines and discussed promotion of off-season tourist traffic, air age education, public relations media and techniques, public opinion research and other topics. Provisions were made for the exchange of information and continuing consultation between companies.

IATA CLEARING HOUSE

A doubling of the volume of international air traffic clearances in the IATA Clearing House during the first five months of this year indicates that airlines are entering upon what will probably be the busiest international season to date. Transactions of the Clearing House during May, which marks the beginning of the Summer season, already total $14,417,000—only slightly below the high mark of $15,161,000 set in September last at the peak of the traffic curve.

The first five months' transactions this year have been $60,790,000, as against $33,410,000 in the same period of 1948. Settlements by offset, which eliminate the necessity for cash transactions, exchange premiums, etc., are running as high as 85 per cent per month.

The final report of 1948 Clearing House operations, issued in March, showed an annual turnover of $124,000,000, as against a $52,400,000 total for 1947. Offset accounted for the settlement of 78 per cent of all 1948 transactions and cash payments of only $13,640,000 were required to clear them completely. A feature of 1948 operations was the protection which Clearing House regulations afforded members against substantial losses in the devaluation of the French franc, and the accretion in value of the New Zealand pound.

The Clearing House now has 36 members.

LEGAL MATTERS

A meeting of the IATA Legal Committee at The Hague during September will discuss negotiability of the air waybill/consignment note and review a glossary of traffic terms developed on the basis of the new IATA Conditions of Carriage. The Committee will also consider the reports of the IATA Observers at the Spring meeting of the ICAO Legal Committee, covering such matters as the Warsaw and Rome Conventions and legal aspects of insurance and search, assistance and rescue. Other matters under consideration include a number of traffic questions arising out of the use of the new IATA standard passenger ticket and the air waybill, and the subject of interlending of spare parts by airlines.

FINANCIAL MATTERS

A new Manual of IATA Accounting Procedures developed by the Financial Committee is now being distributed to all IATA members with the strong recommendation that it be followed to the greatest extent possible. The Manual sets up definite accounting procedures with respect to passengers, cargo, Universal Air Travel Plan, issue wires and miscellaneous matters, and contains a comprehensive outline of procedures to be followed in the use of the new IATA air waybill/consignment note. A similar Manual of

Clearing House Procedures has also been issued with the imprimatur of the Financial Committee.

Fifth Annual Meeting

The Fifth Annual General Meeting of IATA from September 12 to 16 in the Palace of Peace at The Hague will commemorate the thirtieth anniversaries of the international commercial operations and of the foundation of IATA as the International Air *Traffic* Association in the same city in 1919.

Dr. Albert Plesman, President-Director of KLM Royal Dutch Airlines, will take office as President of IATA at the opening session, succeeding M. Gilbert Perier, Chairman of the Board of SABENA, the Belgian airline. The annual assembly will receive reports of all phases of IATA activity during the year and will give general policy guidance to the Executive Committee and the Director General, Sir William P. Hildred.

FOURTH SESSION OF THE ICAO LEGAL COMMITTEE

Reproduced below are pp. 13, 15 *of the Summary of the work of the Legal Committee (ICAO Doc.* 6025 *LC/122* 21/6/49) *relevant to limits of liability under the Warsaw and Rome Conventions. The Committee met* 19 *times in Montreal between June* 7-18, 1949.

ANNEX "C"

Report to the Council on the Question of Limits of Liability in the Warsaw Convention (as Adopted by the ICAO Legal Committee on 17 June, 1949)

1. On 16 June, 1949, the Legal Committee decided "to report to the Council the results of its discussion on the question of limits of liability, and requested that such Report be sent to the States with a request for a statement of their further views, if any, on the need of revising the limits of liability, with ample time for States to give their replies before the next session of the Committee."

2. After consideration of the replies received from Governments and the opinions expressed by members of the Legal Committee (which replies and opinions are annexed to this Report together with the synthesis prepared by the Secretariat), the following questions were submitted to the vote of the Committee with the respective results:

(a) Does the Committee agree that the limits of liability of the Warsaw Convention should be increased by 100% with respect to bodily injury where death does not result?—(4 votes for—8 against).

(b) Does the Committee agree that the limits of liability of the Warsaw Convention should be increased by 25% with respect to bodily injury where death does not result?—(6 votes for—8 against).

(c) Does the Committee agree that the limits of liability of the Warsaw Convention should be increased by 100% with respect to death or permanent total disability?—(3 votes for—12 against).

(d) Does the Committee agree that the limits of liability of the Warsaw Convention should be increased by 25% with respect to death or permanent total disability?—(7 votes for—8 against).

3. Therefore, in accordance with the above resolution, the Legal Committee request the Council that this Report be sent as soon as possible to the States with a request for a statement of their further views, if any, on the need of revising the limits of liability with ample time for States to give their replies before the next session of the Committee.

ANNEX "D"

QUESTIONNAIRE ON THE LIMITS OF LIABILITY IN THE ROME CONVENTION

The Legal Committee of ICAO, in considering the comments of the States received in reply to the Questionnaire on the revision of the Rome Convention, recognized that the opinions of the Governments differ greatly on the principle on which limits of liability should be based.

Consequently, it put the different solutions proposed in that Questionnaire to a vote. Since none of them obtained a majority in their favour, a compromise solution was adopted basing the limits, to a certain extent, on the weight of the aircraft. However, it was agreed that since the potential damage which may be caused by an aircraft cannot be considered to correspond mathematically to the weight of such aircraft, aircraft should be classified in groups, each with specific limit of liability.

The Sub-Committee was entrusted with the task of establishing such classification and with suggesting corresponding limits of liability. The Sub-Committee's proposal should be forwarded to the various Governments to obtain their comments.

Accordingly, the following questions are submitted in the hope that answers thereto may be received from the largest possible number of States, as soon as conveniently possible and in any event not later than September 1, 1949.

1. Is the Government in favour of the following classification of aircraft:

1—aircraft weighing up to 12,500 lbs.
2—aircraft weighing from 12,500 lbs. to 29,999 lbs.
3—aircraft weighing from 30,000 lbs. to 79,999 lbs.
4—aircraft weighing from 80,000 lbs. to 119,999 lbs.
5—aircraft weighing 120,000 lbs. and over.

NOTE: By weight should be understood the weight of the aircraft with the maximum authorized load specified by the airworthiness certificate for the type of operation being conducted.

REPORT ON RECENT DEVELOPMENTS IN INTERNATIONAL AIR TRANSPORT LAW TO SECTION OF INTERNATIONAL AND COMPARATIVE LAW OF AMERICAN BAR ASSOCIATION, MAY 27, 1949

THE past calendar year was significant to lawyers concerned with problems of international air transportation both because of projects completed and those initiated. American government and carrier counsel continued to take an important part in the legal activities of the International Civil Aviation Organization and the private deliberations of the International Air Transport Association.

CONVENTION ON THE INTERNATIONAL RECOGNITION OF RIGHTS IN AIRCRAFT

Much of this effort was devoted to the completion of the carefully and concisely drafted Convention on the International Recognition of Rights in Aircraft,[1] signed by the United States and 19 other powers at the Second Assembly of the International Civil Aviation Organization (ICAO) at Geneva on June 19, 1948. The global mobility of fleets of costly transport aircraft has naturally made lending institutions hesitate to invest until they can be assured that the priority of their security rights will be recognized

[1] For text see, 15 J. Air L. & C. 348 (1948).

in all countries to which the planes might be flown. This is a prime objective of the Convention.

The nature and priority of security liens on chattels is a field of private law wherein national concepts differ markedly. In the United States, many security devices have been found suitable for airline financing, particularly the equipment trust leasing method developed for the railroads. Other countries have no such elaborate security devices, and few are willing to accept unreservedly those used in the United States.

Almost from the founding of the Comite International Technique d'Experts Juridiques Aeriens (CITEJA) in 1926, consideration has been given to drafting conventions relating to an aeronautical property record and to aircraft mortgages and other security interests. Early attempts to agree upon a "treaty mortgage" analogous to that found in maritime conventions were not fruitful, and this approach would have sacrificed the flexibility of the various U.S. financing devices.

For this and other reasons, the Convention signed at Geneva is not a text of international unification but of mutual recognition by the contracting powers of security and property rights created according to the laws of the nationality of the aircraft. With American initiative, the difficult problems of conflicts of laws presented by this approach were resolved into a workable accord, as attested by the signatures of 23 countries.[2]

The basic concept [3] is that the contracting states agree to recognize (a) rights of property in aircraft, *i.e.*, title or outright ownership; (b) rights to acquire planes by purchase coupled with possession, *i.e.*, purchase by conditional sale, or option rights under a hire purchase agreement or equipment trust; (c) rights to possession of aircraft under a lease of 6 months or more, *i.e.*, equipment trusts and ordinary long term leases; (d) mortgages, hypotheques, and similar rights in aircraft which are contractually created as security for payment of a debt, upon 2 conditions and not to give other interests priority. The first condition is that the right must be constituted according to the law of the nationality of the aircraft—not the *lex loci contractus* or the intention of the parties—and the second is that it must be recorded by the state of the aircraft's nationality.

In addition to protecting creditors who may lend money on aircraft as security, the Convention clarifies the rights of third parties dealing with aircraft with respect to hidden liens, defines privilege or priority claims which take priority over recorded liens [4] and allows transfer of title from one signatory state to another only on payment or consent of all recorded claims.[5]

On January 13, 1949 the President of the United States transmitted the Convention to the Senate for its advice and consent to ratification. On February 1, the Committee on Aeronautical Law and the Associate and Advisory Committee of the American Bar Association unanimously recommended approval, a position which this Committee wholeheartedly approves and one

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[2] Signatures of Denmark, Norway and Sweden early in January of 1949 brought the number to 23.

[3] See editorial by E.C.S. at 16 J. Air L. & C. 61 (1949) and annotated text prepared by Air Coordinating Committee 70-92; also R. O. Wilberforce, *The International Recognition of Rights in Aircraft*, 2 Int'l. L. Q. 421-450 (Aug., 1948) for the British point of view. For the general background of the Convention, see G. N. Calkins, *Creation and International Recognition of Title and Security Rights in Aircraft*, 15 J. Air L. & C. 156-80 (1948).

[4] Restricted to recent salvage claims and "extraordinary expenses indispensable for the preservation of the aircraft," but not including state "fiscal claims."

[5] Extension of recognition of security rights to include fleet mortgages and spare parts raised many unusual problems.

which it suggests the Section endorse. On March 9, 1949 a hearing was held by the Senate Foreign Relations Committee at which all testimony heard favored immediate ratification.

Review of Second Session of ICAO Legal Committee

The ICAO Legal Committee held its Second Session [6] in Geneva between May 28 and June 18, 1948 [7] and discussed modifications of the Chicago Convention's [8] amendment procedure through alteration of Article 94,[9] revision of the important Warsaw Convention,[10] representation of international organizations at meetings of the Sub-Committee handling the Warsaw Changes, redrafting the Rome Convention [11] and the Brussels Protocol relating to damage to third parties and property on the surface, the draft convention on the legal status of the aircraft commander, and legal problems in search, assistance, and rescue.[12]

Review of Third Session of ICAO Legal Committee

The Third Session of the ICAO Legal Committee met in Lisbon from September 17 to October 2 and took up pressing matters of insurance requirements, revision of Article 94 of the Chicago Convention, assistance and joint support of aviation facilities, modification of the Warsaw Convention,[13] redrafting of the Rome Convention and related issues.

The Sub-Committee on Insurance analyzed requirements for insurance of air carrier liability, including that to passengers, crew, third parties on the surface, and to cargo owners, as well as hull risk and fire insurance, and liability in case of collision or assistance and salvage. It concluded that there was no immediate need for a general convention on insurance affairs.[14]

The Sub-Committee on Assistance narrowed the issues before it to treatment of 3 possible methods of reimbursing a state for search and rescue assistance rendered to foreign aircraft in distress:

(1) on a joint support basis.

(2) direct recovery against the assisted plane in accord with the principles of the Rome Convention and Draft Convention on Assistance to Aircraft on Land.

(3) on the basis of reimbursement for actual expenditures in each search and rescue operation.

The U.S. Delegation suggested that the Air Coordinating Committee develop a legal position on this problem, and such work is in process.

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[6] *Summary of the Work of the Legal Committee During its Second Session*, ICAO Doc. 6012 LC/109 19/6/48.

[7] The Sub-Committee on Revision of the Rome Convention and of the Brussels Protocol and the Sub-Committee on Definitions met on June 26, 1948.

[8] International Civil Aviation Conference, Chgo. Nov. 1 to Dec. 7, 1944, *Final Act and Related Documents*, Dep't. of State. No. 2882, Conf. Ser. 64. (G.P.O. 1945.)

[9] See H. H. Jones, *Amending the Chicago Convention and Its Technical Annexes—Can Consent of all Member States Be Eliminated?*, 16 J. Air L. & C. 185 (1949).

[10] Full Text available at 215-228 of the revised Sept. 1, 1948 edition of Aeronautical Statutes and Related Material (G.P.O., 1948).

[11] Dep't. of State Treaty Inf. Bull. No. 47, Aug., 1933; 1933 USAvR 284; for *situs* of ratifications, *see* 1944 USAvR 90.

[12] The U.S. was represented by Messrs. Calkins, Elwell, and Tipton of the CAB, the CAA, and the ATA.

[13] For some background on the pressure for revision, *see* K. M. Beaumont, *Some Anomalies Requiring Amendment in the Warsaw Convention of* 1929, 14 J. Air L. & C. 30-36 (1947) and *Some Problems Involved in Revision of the Warsaw Convention*, 15 J. Air L. & C. 14 (1949).

[14] ICAO Doc. 6021 LC/118 Annex D, dated Oct. 1, 1948, at 2.

The urgency of redrafting Article 94 for the ICAO Council prevented giving much attention to the very considerable Warsaw questions, although it was recommended that the existing standard of liability with the burden of proof on the carrier should be maintained.[15] The Sub-Committee on the Warsaw Convention was uncertain as to the advisability of increasing the existing limits of liability, and recommended that a questionnaire be circulated to ascertain diverse national views.

Advice on Policy from Non-Governmental Counsel

The ACC Legal Subcommittee announced on April 26, 1949 the establishment of a panel to be known as the "ICAO Legal Advisory Group." It was agreed that:

> "Persons having such competence or interest in a subject would be invited to participate in the work of the ICAO Section on that subject . . . In recent months the Secretary, with the informal assistance of the Subcommittee, has prepared a list of individuals and organizations who, it was felt, should be consulted on appropriate ICAO matters as they arose before the Legal Subcommittee."

The presence of airline counsel on the United States delegation to the Second Session reflects the increasing tendency of the federal government quite properly to call upon specialized private attorneys for advice and assistance in regard to the broad program of revision of fundamental international air transport conventions in progress, but at the same time evoked criticism that the general public and various industrial and business groups were not sufficiently represented.

Until recently, non-governmental assistance to the Legal Subcommittee of the interdepartmental Air Coordinating Committee [16] has been restricted on ICAO affairs to advice from specialists (listed on an intra-governmental list) specifically called in for the purposes. Shortly before the Third Session of the ICAO Legal Committee the assistance of the 3 non-governmental U.S. members of the ICAO Legal Committee was sought. The desirability of establishing machinery for broadening the participation of non-governmental lawyers in the formulation of U.S. positions was strengthened by the Report of the Chairman of the U.S. Delegation to the Third Session of the ICAO Legal Committee:[17]

> "The present composition of the (ICAO Legal) Committee derives from several sources. There are lawyers who are employed on a full-time basis by their governments and whose work is primarily in the aeronautical field. Examples of countries usually represented in this manner are Canada, Argentina, Belgium, and Australia, and to a large extent the United States. Other countries however, are generally represented by private practitioners (United Kingdom, France), by judges (Norway, Netherlands) and by law professors (Portugal, Italy) to give but a few examples. Thus, the Committee as a whole represents a cross-section of the field of legal experience. In the opinion of the delegation the maintenance of this balance is highly desirable for the purpose of developing new international conventions on private air law, since so much of the material considered by the Committee relates not only to aviation but to the effect of aviation on the general commerce and life of the community as well."

Members of this Section of the American Bar Association with special qualifications and who desire to offer their services to the "ICAO Advisory Group" should communicate directly with the Executive Secretary of the Air Coordinating Committee in the Department of Commerce Building in Washington.

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[15] ACC 51/29.21 at 19.

[16] It is the ACC which evolves integrated U.S. policies on these matters.

[17] ACC 51/29.21 at 23.

RECENT DEVELOPMENT OF U.S. POLICY—THE WARSAW CONVENTION

After an ACC Working Group had prepared suggested material for the ICAO questionnaire on limitation of liability for passengers, baggage and cargo for the revision to the Warsaw Convention, air transport industry lawyers and other private counsel were called together on February 17 to comment on United States policy.

By the end of April a "firm" U.S. position was reached by the ACC. It favored the present limitation of liability for cargo of $7.40 per pound and indicated that this country would support but not initiate an upward revision of the limit of liability for the death of a passenger now fixed in relation to gold francs at $8,291.87. As the current maximum recovery for non-fatal injury is the same as the death limit, it is extremely low by American standards and the United States position favors an increase if a new convention should be found desirable.

This Committee endorses the desirability of raising the limit for passengers, provided the great majority of nations will concur.[18] Further, it is disappointing that the official position is not one proposing to initiate reasonable increases in passenger liability limits. In recent years many of our States have raised their limits for death by wrongful act and none imposes a limit for non-fatal injuries.

The standard of liability in the existing Convention has been described as both "absolute and limited" and as "liability based on negligence with a shift of the burden of proof to the carrier to establish freedom from negligence on its part." Neither appears wholly correct.[19] The present basis of liability is not easy to describe accurately,[20] and with the apparent preoccupation with the merits of raising the limitation of liability and other controversial issues, it appears that the basis of all liability may be altered at the Fourth Session of the Legal Committee, with approval of the U.S. delegation, without due consideration to the grave public interests involved. This may be done by reaffirming the simple substitution of the word "reasonable" for

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[18] See Clare, *Evaluation of Proposals to Increase the Warsaw Convention Limits of Passenger Liability*, 16 J. Air L. & C. 53 (1949).

[19] While Article 17 makes the carrier liable for the death or wounding of a passenger in certain defined accidents, Article 20 provides the "standards":

"(1) The carrier shall not be liable if he proves that he and his agents have taken all necessary measures to avoid the damage or that it was impossible for him or them to take such measures.

"(2) In the transportation of goods and baggage the carrier shall not be liable if he proves that the damage was occasioned by an error in piloting, in the handling of the aircraft or in navigation and that, in all other respects, he and his agents have taken all necessary measures to avoid the damage."

See U. S. Treaty Ser. No. 876 (G.P.O. 1934).

[20] The most recent instance of glossing over the important principle here discussed occurs in the treatment of *"Bases of Liability"* in the Draft Report of the Warsaw Sub-Committee for the Fourth Session of the ICAO Legal Committee, prepared by Major K. M. Beaumont, Rapporteur. Paragraph 13 reads:

"*Basis of Liability*—The Sub-Committee recommended, and the Committee agreed in principle that the existing basis of liability should be maintained—namely liability based upon negligence, but with the burden of proving that he had taken all necessary measures to avoid the damage being cast upon the carrier. This important variation of the normal principle is of extreme value to claimants. It was incorporated in the existing Convention because of the practical difficulty, in many air accidents, of proving the cause of the accident. Hence the claimant was, in effect, placed in a position analogous to that in which he would have been if the principle of *absolute (objective) liability* had been applicable; and, in exchange for this important and valuable departure from the normal rule, moderate limits of the carrier's liability were imposed."

"necessary" in Section 20(1).[21] At present, the passenger may recover for provable damages up to $8,291.87 without a showing of negligence, unless the airline comes forward and proves that all its ground and flight employees were free from fault, *i.e.*, that they had taken "all *necessary* measures" to avoid the damage or that it was "impossible for him or them to take such measures." On the other hand, the passenger may now prove unlimited provable damages if he can affirmatively prove "wilful misconduct."

The proviso permits the air carrier to avoid all liability if it convinces the judge or jury that the accident was caused by lightning, unpreventable act of a maniac, or due to some positive act or omission of an independent third party or government agency, such as a wrong order of a control tower operator which the pilot could not detect as improper.[22] To add to these defenses, escape from liability on proof that the airline's employees had taken all *reasonable* measures clearly shifts the fundamental basis of liability to that of ordinary negligence—a retrogression to common law developed in the stagecoach era and carried over to the automobile, but not law evolved to meet modern industrial and technological progress as were Workman's Compensation laws.

To urge that "if all necessary measures have been taken, there will be no damage" [23] overlooks the important role that third parties play in airline operations—especially in traffic control, communications and airport operations, to say nothing of that played by those manufacturing aircraft and components.

In recommending that the limitation of liability apply regardless of ticket defects or degrees of negligence short of wilful misconduct, a progressive step is taken. However, to recommend further subsidization of international air carriage at the expense of the passenger (and his dependents) who must commit his complete safety to the airline on being locked in the carrier's passenger compartment may well be pushing the doctrine of assumption of risk too far.

Now, under the Warsaw Convention, the carrier of international traffic must convincingly demonstrate that the fault of the accident was due to some third person or outside force in order to avoid the modest limits of damages, and not stop with showing that his technical operations complied "reasonably" with all applicable regulations and practices—proof probably short of the "highest degree of care" demanded of surface common carriers in the United States. This Section of the American Bar Association is urged to support continuation of present standards of liability in any revision of the thus far effective Warsaw Convention.

Mr. Albert L. Wolf, member of the Committee, invites attention to the "unwary air shipper's peril" resulting from Article 20(2) of the present Convention exonerating the airline from liability in connection with goods and baggage when it proves that "the damage was occasioned by an error in piloting, in the handling of the aircraft, or in navigation." Mr. Wolf comments:

> "This means that in the event of the negligent handling of the aircraft by its pilot, navigator, radio operator, engineer or other crew mem-

[21] This "innocent" change was discussed at the XIV Plenary Session of CITEJA in Paris in January 1945. (Res. 143 of said session; *see* footnote 16 to p. 100, 14 J. Air L. & C. (1947).

[22] A. W. Knauth, *Some Notes on the Warsaw Convention of* 1929, 14 J. Air L. & C. 44-45 (1947). However, *see* K. M. Beaumont, *"Some Anomalies Requiring Amendment in the Warsaw Convention of* 1929," 14 J. Air L. & C. 30 at 33 (1947) where it is said that "necessary measures" is "construed in English law as meaning 'reasonably necessary' or 'reasonable measures.'"

[23] Res. 143, cit. *supra* note 21. See generally, Wetter, *"Possible Simplification of the Warsaw Convention Liability Rules,"* 15 J. Air L. & C. 1 (1948).

ber, there can be no recovery for loss occasioned the airshipper thereby. Consider railroads, or truckers. Would the public be likely to use them to ship goods if, when these goods were lost through the negligence of the engineer or driver, no recovery could be had against the railroad or truck company? If the public were coerced, yes, but otherwise no. What excuse can presently be offered for this antique clause?" [24]

The incongruous results of this Section have been given much attention [25] and it is the understanding of the Chairman that the general sentiments expressed favors applying the same standard of liability to goods and baggage as to passengers, notwithstanding the higher standards imposed on surface carriers of property in the United States, but not imposed uniformly by foreign nations.

Revision of the Rome Convention

Activity to promote revision of the Rome Convention has been accelerated during the past year.[26] This Convention, dealing with liability of the international air carrier to persons and property on the surface, was drawn up in 1933 and signed by the U. S. Delegate, and has been ratified by Belgium, Brazil, Guatemala, Romania, and Spain. As this is the minimum number of countries required to bring the Convention into force, it presumably is in force with respect to them. However, certain of its principles are not acceptable to carriers and insurance groups.

During the year, a comprehensive ICAO questionnaire was circulated to member nations requesting their views on the fundamental principles that should be incorporated in a new convention covering surface damage, collision of aircraft and insurance requirements. A working group composed of CAB, CAA, the State Department and ATA prepared draft answers for the United States. As with the Warsaw limitation proposal, expert private counsel and interested organizations from the new ACC "ICAO Legal Advisory Group" were invited to submit comments and to meet on May 6.

Public and private attorneys joined insurance experts in going over the draft U. S. reply, spending considerable time on the controversial question of whether to endorse the present provisions providing for so-called absolute but limited liability for damage caused by aircraft to third persons or property on the surface. Only the memorandum of your Chairman appears to have supported this principle. The final U. S. position is now being formulated by the ACC and will be transmitted to ICAO before the Fourth Session of the ICAO Legal Committee in June.

The discussions revealed that carrier and government counsel have moved away from the continental law concept of absolute but limited liability for surface catastrophies, except perhaps in case of intentional or wilful act. They appear to favor legislating the same standard of liability for damage caused to innocent persons on the surface as that recommended for airline passengers in any revision of the Warsaw Convention, i.e. the burden would be on the carrier to prove that it had taken all reasonable measures to avert the accident.

The Chairman of this Committee remains unconvinced of the wisdom of such action, despite the argument that a standard of absolute but limited liability for civil aviation would impose a more rigorous one than that applied to other forms of passenger transport. On the other hand, only the

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[24] See Alfred L. Wolf, *"The Unwary Airshipper's Peril,"* Chairman on the Law in Relation to Aeronautics, Pennsylvania Bar Ass'n., 20 Pa. Bar Ass'n. Q. 170 (Jan. 1949).

[25] See K. M. Beaumont, *"Some Anomalies Requiring Amendment in the Warsaw Convention of* 1929," 14 J. Air L. & C. 30 at 33 (1947).

[26] For Text of Rome Convention, see citation note 11, *supra.*

shipowner enjoys effective limitation of total liability, and no surface carrier has special limitations on serious injuries or death.

This Committee certainly opposes any improper discrimination between different modes of common carrier travel, but also believes that retention of the present standard of limited but absolute liability will have a more beneficial effect upon the future developments of flying than shifting the loss for non-negligent accident to innocent bystanders living in this rapidly evolving Air Age.

To urge that relatively inexpensive insurance is today available to all persons and to property owners for the remote possibility of damage from aircraft falling, or objects therefrom, seems at once to recognize that there is a very real danger which should be covered by insurance, and to shift the burden away from those who initiated the danger by defying the forces of gravity. Persons not on established airports are in no real sense then participating in any phase of air transportation, and certainly have not assumed any of the risks taken by a passenger or shipper. It has been argued that everyone must assume a proper share of these risks if each is to enjoy the benefits of life in an Air Age. Aside from the fact that the benefit to many individuals may be difficult to discern, it might be reasoned that, if this risk of falling objects is one which Society as a whole should bear, the best method of spreading the burden is through a system in which the government would be the insurer. It seems inopportune to encourage any program which might bring the government into the insurance business in this wholesale manner—one which would be regarded as another subsidy to international air transportation.

Section 5 of the Uniform State Law for Aeronautics of 1922, in effect in 15 jurisdictions, provides that the owner or lessee of a plane is "absolutely liable" for injuries to persons or property on the ground "caused by the ascent, descent, or flight of the aircraft, or the dropping or falling of any object therefrom, whether such owner was negligent or not" unless there was contributory negligence. This "anticipatory legislation" has certainly been shown to have been unnecessary. But it is worth noting that the section has created no reported hardship during a time in which aircraft were admittedly more hazardous, except perhaps adversely affecting insurance rates. The section certainly did not retard the full growth of civil aviation in the States adopting it.[27]

In criticizing the American Law Institute's Restatement of Torts for classifying aviation as "ultra-hazardous," the Chairman of this Committee in a study on these problems for the CAB in 1941 pointed out[28] that under that definition

> "the operator of the aircraft is now absolutely liable under the principles of the common law to third persons and property on the ground elsewhere than at an airport, but, on the other hand, he is not subject to absolute liability with respect to passengers, goods carried therein, or persons on an airport. The Institute cites no case expressly characterizing aviation as an ultra-hazardous activity.
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> "The small amount of damage that aircraft have caused to persons and property on the ground since the origin of flight would appear to negative the contention that aircraft involve unusual hazards to such persons, although it is recognized that the possibility, if not the prob-

[27] Public Law 656 was passed on July 2, 1948 by the 2nd Session of the 80th Congress to exempt persons holding security interests only in aircraft from liability in damage suits.

[28] Report to CAB of Study of Proposed Aviation Liability Legislation, June 1, 1941, 40-51.

ability, of great damage remains. Since aviation has become an accepted and essential mode of transportation and is rapidly becoming as much a matter of common usage as the railroad and automobile, it seems doubtful whether civil aviation in 1941 may be characterized as ultra-hazardous under the common law, pursuant to the standards recognized by the Institute, without, at the same time, so classifying the railroad, the truck and the private automobile.

"Aircraft accidents to persons not on airports are like railroad accidents to persons on property alongside of, but not upon, their right-of-way. As to persons (even trespassers) on such property, whether public or private, the railroads owe a clear duty to keep their trains within the limits of their own right-of-way. However, the railroad's liability to such persons and to persons on public and private crossings who are injured by things falling or being thrown from passing trains is generally based upon the principle of negligence. Similarly, when an automobile leaves the highway and injures persons on adjoining sidewalks and outside the right-of-way, the liability of a motorist is predicated upon negligence, aided by the rule of *res ipsa loquitur*.

"From this resume of law it appears that in a somewhat similar situation the courts have not found it necessary to characterize other modern mechanical vehicles as ultra-hazardous instrumentalities in order consistently to render judgments in favor of persons who are injured by such vehicles at a time when they are not participating in any way in the particular mode of travel. Following this precedent, the courts appear to be reaching this same result in actions brought by persons on the ground injured by aircraft and doing so without expressly characterizing aviation as 'ultra-hazardous.'

"The Rome Convention suggests absolute liability as the standard of liability which the aircraft operator owes to persons and property on the ground for damage caused by the aircraft itself or any object falling therefrom.

"While the liability proposed by the Rome Convention is perhaps stricter than the liability imposed upon the railroads and automobiles for injuries to persons and property outside of their right-of-way, it appears to involve no great departure from present law. It has been shown that section 5 of the Uniform State Law for Aeronautics of 1922 imposes 'absolute liability' and that the few courts that have considered the problem have reached the same results at common law by finding the operator negligent or by applying, although not expressly, the doctrine of 'ultra-hazardous' activity."

These comments are plainly relevant to allegations of discrimination which have been founded upon statements that there is no absolute liability for other transport media, except in the case of goods carried, in light of the continuing public confidence in and healthy growth of air transportation under the present concept of virtually absolute liability to third persons on the surface. In any case, if that standard should be modified by international convention, it would seem unfair also to limit arbitrarily the recovery in future accidents no matter how great the catastrophe or hardship to persons on the surface.

Adoption of ICAO Technical Standards and Recommended Practices

The following section has been forwarded by Mr. Alfred L. Wolf, member of the Committee, for inclusion in the report:

"It is felt by some members of your Committee on International Transportation that the legislative activities of ICAO have worked a lit-

tle hardship on flying activity in the United States. This has come about through the failure of the representatives of the United States at ICAO to review proposed technical standards and recommended practices with the parties affected. Thereafter, these Standards are promulgated by ICAO and then through progressive steps may become the effective law governing the flight activities of the adherents, including the United States.

"Through this inadvertence of the representatives of the United States, or their inattention to the views of the parties affected, certain doctrines have advanced to the point of promulgation which did not in any way represent the 'better will' of the affected United States citizens, nor indeed their government's and enlightened representatives.

"While for some reason wide advance publicity was given to the 'Convention on the International Recognition of Rights in Aircraft,' on the other hand, the case of the sudden abandonment through ICAO action of the phonetic system of abbreviations used for years in the United States 'NOTAMS' represents a leading instance of the wilful disregard at international level of the wishes of most parties affected.

"It is the view of these members of your Committee that ICAO must either limit its legislative endeavors to the very broadest principles or else the United States delegates must find means and time to follow a practice of submitting to the majoriy of those affected, in any way, all proposed Standards and Recommended Practices. This may seem onerous, yet within the United States for the last decade at least, it has been the program of the Federal Civil Aeronautics authorities to submit proprosed regulations to those affected in advance, and, when necessary, hold hearings on them before their adoption. Civil aviation legislation should go through normal legislative procedure which certainly throws it under the scrutiny of all affected. These members of your Committee therefore urge that either a rule of wider representation be arranged to protect the interests of the affected citizens of each adherent or that steps be taken domestically to throw open to public scrutiny, study, and criticism, proposed ICAO Technical Standards and Recommended Practices."

PROSPECTS FOR 1949-1950

The proposed agenda for the Fourth Session of the ICAO Legal Committee in Montreal on June 7, 1949 includes:

(1) consideration of the Report of the Subcommittee on Revision of the Warsaw Convention;

(2) consideration of the Report of the Subcommittee on Revision of the Rome Convention and related matters;

(3) consideration of answers to the questionnaire on search, assistance, and rescue;

(4) consideration of the Report of the Subcommittee on Definitions;

(5) consideration of questions of double insurance, if any.

Thus, it is clear that the next year will see the lawyers concerned with international air transportation at work on some of the fundamental conventions and problems, and that these sizable tasks will put a heavy burden upon the considerable legal talent which the United States has in this field. It is obvious that a program of cooperation and joint effort by private counsel and government personnel will be necessary if the U.S. is to meet its responsibilities and continue its leadership.

Respectfully submitted,

EDWARD C. SWEENEY, *Chairman*,

Committee on International Transportation of Section on International and Comparative Law of American Bar Association.

NOTE: This report was circulated to but not specifically approved by all members of the Committee, who are:

ALFRED WOLF, *Vice Chairman*	JOHN J. O'CONNOR
SUEL O. ARNOLD	ORVILLE A. PARK, JR.
JAMES A. GLEASON	JOHN A. PERKINS
ALLAN B. LUTZ	ALBERT E. REITZEL
LIONEL P. MARKS	R. C. WHITTEMORE

Recommendation No. 4 *Adopted by the Section of International and Comparative Law and submitted to the American Bar Association for action at its Annual Meeting in September,* 1949.

RESOLVED That the American Bar Association urge the Air Coordinating Committee to instruct the United States delegates to the Legal Committee of the International Civil Aviation Organization to:

(1) Advocate an increase in the present presumptive liability limitation of $8,291.87 in damages for death or non-fatal personal injury in international air transportation imposed by the Warsaw Convention.

(2) Oppose exonerating the international air carrier from liability to his passengers upon the mere showing that "reasonable measures" were taken by it to conduct a safe operation as urged by the Rapporteur on the revision of the Warsaw Convention.

(3) Insist that aircraft operators should be responsible, regardless of negligence, for damages on the surface to innocent persons and their property unless the accident is proved to be due to an Act of God or third party.

FEDERAL

Department Editor: Walter H. Wager*

THE THREE HORSE TEAM OF AMERICAN AVIATION

An address by Senator Edwin C. Johnson, Chairman of the U.S. Senate Interstate and Foreign Commerce Committee, delivered July 15, 1949 at the Aviation Celebration of the Kansas City, Mo., Chamber of Commerce.

I AM pleased to be a guest tonight of the Kansas City Chamber of Commerce as it celebrates the twentieth anniversary of the inauguration by TWA of its transcontinental service through this throbbing hub of air transportation. . . .

Airline Outlook at Close of 1948

As the year 1948 closed its books on December 31 many question marks faced our most dynamic and spectacular transportation facility—the airlines. On that day they had every right to have fear in their hearts. The cost of doing business was going up hour by hour, and try as hard as they might red ink crept into and gradually took over their ledgers.

Competition was hitting them hard. Their credit was exhausted and their day by day revenues would not begin to sustain them. The CAB had slowed down to a snail's pace in awarding back mail pay long overdue. The outlook for a general recession in business was generally recognized as a virtual certainty. Its intensity and endurance were the only unknown factors. The mass production lines were turning out much larger and much more efficient planes which the airlines could not afford to purchase, but if they were to remain in business neither could they afford not to purchase.

In that dark hour I announced that the Senate Committee on Interstate and Foreign Commerce would undertake at once a thorough investigation of every phase and aspect of the airline industry. This awakened the CAB, and in that "Ivory Tower" things long delayed began to happen. Today the picture is quite different.

Fixed charges and operating expenses now have registered slight declines. The morale of employees has shown marked improvement. The long looked-for buyers market has returned, and the almost forgotten traveling salesman is calling on the trade again. Merchants are playing their inventories close to the belt and watching the market with an eagle eye. This necessitates frequent and quick journeys, and so they travel by air. The new commodious efficient planes are leaving and arriving with dependable regularity and nearly everyone can have a seat without too much advance reservation. Air safety has made tremendous gains. The recent aircraft disasters in far parts of the world should not be confused with the excellent record of our certificated domestic airlines. . . .

On June 29th, my Committee heard the 79th witness in the longest and most comprehensive aviation hearings[1] in Congressional history. Govern-

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* Member of the New York Bar.

[1] Senate Resolution 50, 81st Congress, 1st Session, adopted April 12, 1949, entitled: "Resolution to investigate problems relating to the air-line industry, the United States merchant marine, domestic land and water transportation, and radio, telegraph, and telephone communications."

"*Resolved*, That the Committee on Interstate and Foreign Commerce, or any duly authorized subcommittee thereof, is authorized and directed during the Eighty-first Congress to make a full and complete study and investigation of such problems as it may deem proper relating to (1) the financial stability and operational efficiency of the air-line industry; . . ."

mental Agencies, Airline officials, Airport Management, representatives of organized labor, Attorneys, Economists, Investment Bankers, Consultants, critics and everyone who had anything to contribute were heard at length. However, our most important witness, the Secretary of National Defense, said he would not be ready to testify for some weeks. While this is a disappointment, we understand the necessity for the delay and we will wait patiently.

Due to the extremely heavy burdens of Congress at this particular time, our Committee has not had an opportunity as yet to study and analyze the recently completed hearing material and so has not reached a conclusion with respect to it. The statements, therefore, I make tonight are my own and do not necessarily reflect the thinking or the judgment of the Senate Committee on Interstate and Foreign Commerce. In due course our Committee will publish a report.

In its efforts to be intelligently helpful, the Committee has employed a small, but competent staff who will continue during the balance of the year a searching study into all phases of airline operation, in order to assemble vital facts and pertinent statistics for the guidance of the Members of the Committee.

While the picture is much brighter today than it was six months ago, the airlines are not yet out of the woods. Much, very much, remains to be done by our three horse team—the CAB-CAA, the Airline Industry, and the Congress. If we pull together in friendly cooperation, we will keep them flying.

Most economists are agreed that the war boom is over. Industrial production is going down rapidly and unemployment is increasing steadily. Nearly four million are unemployed and more than four million more are only partially employed. . . . Every industry in the United States, and more especially the transportation industries, must give full thought to these unpleasant factors. This is a time in this country which will separate the men from the boys.

Immediately after the close of hostilities the bubbling spirit of unbridled optimism swept air transportation off its feet and a hectic wave of expansionitis ran its course. To keep pace with the potentials of the cruel mirage of unlimited volume and huge profits, management's imagination soared into the stratosphere and orders for large, luxurious, newly designed aircraft running into millions of dollars were placed; and additional personnel were hurriedly hired and trained for business that did not develop.

In 1945 the entire domestic route miles amounted to approximately 63,000 miles. By 1948 it had grown to 139,000 miles. In 1946 the 16 domestic scheduled airlines were operating a total of 400 planes. In January 1949 this figure rose to 790, of which 313 were 4-engine planes with tremendously increased seating capacity. When it became evident the anticipated increased traffic had not developed and would not be developed, rapid manuvers to reduce expenses to avoid complete financial collapse were taken. Great credit is due the airlines for the speed with which they reversed their field and ran for cover. Nevertheless, they have not gone as far, nor as fast, as the economic pressures of the day demand.

Consolidated Services and Facilities

In Washington, the seven airlines serving it have established consolidated ticket offices in the U. S. Capitol, the Pentagon, and in the Navy Department. Only one manager, seven ticket agents and one auditor are necessary to run these three offices for the seven airlines. In 1948, they transacted more than a million dollars worth of business, and a careful check shows that

almost half was for personal travel and not for official government travel. According to one recognized aviation trade journal, this volume of business "was done without a squawk from any airline about favoritism, service, etc."

The obvious query arises, "Is this joint use of facilities and consolidation of services plan being carried out at each airport; and if not, why not?" The attitude of the industry can best be summed up in the words of Mr. Patterson, President of United, who, in his testimony before our Committee said:

> "If we are really to have competition and real competition—we cannot be in consolidated ticket offices with employees working for all parties concerned. You just cannot have competition under those circumstances. They become order takers."

I am not subscribing to the theory that the combined office plan could eliminate all the individual ticket offices in every city, but I believe it can be done without injuring sales to a far greater extent than now practiced.

Furthermore, once a passenger has determined the line he desires to travel, competition does not require duplication at the airport of ticket offices, information booths; and other travel services. It is obvious that tremendous savings could be realized if ramps and loading equipment, such as tractors, tanks, and all other devices were pooled as one unit instead of maintaining a separate system for each carrier. The same applies with equal force to gasoline and oil and to air-ground communication systems. One group of personnel could operate all such services for all airlines instead of maintaining separate crews. We must not forget that more than 50 percent of an airline's expenses are the wages and salaries of its employees.

Following the war an interesting and revealing experiment in the consolidated operation of an airport took place at Willow Run. Unfortunately, it was not a conspicuous success due to petty quarrelling, and jealousies and the sabotage of the personnel of the various airlines involved. Nevertheless, John Brown, an analyst for the corporation which conducted the operation testified that there was a saving of 30 percent in manpower, and in terminal building space. He also maintains that individual airlines received better and quicker service under the consolidated operation. A more aggressive approach by the airlines in this direction would, I believe, produce savings without sacrifice in service. *If the CAB eliminated some of these lone wolf duplicating operations as legitimate expenses in determining mail pay, we would have a very different story, as I see it.*

Interchange Agreements

Interchange of equipment provides another way to save money. It would encourage through traffic arrangements without extending the route of a carrier and without increasing overhead cost to the extent that would be necessary in the event a route was extended by a carrier. The theory of interchange is very appealing to a passenger because he remains aboard the same plane over two or three different routes of different carriers.

The advantages are three-fold: (1) cost of operations are much lower than in extending a route of a carrier; (2) it may be a means of strengthening a short-haul or regional carrier, who ordinarily does not receive the benefits of traffic moving beyond his terminal; and (3) elimination of what is now branded excessive competition between points, since instead of duplicating routes, such an interchange avoids the necessity of duplicating or extending routes, but at the same time offers substantially the same service to the public. *It can well be said that had interchange agreements been entered into more extensively during the post war expansion period, we might have had a more constructive development of the air route pattern*

without duplicating route certifications. This might well have contributed to the elimination of the losses sustained by many carriers during the past three years.

COACH SERVICE

In my opinion, air transportation is about to become the most attractive and economic transportation in history. It has already outdistanced all competitors in the element of speed. I still look for a tremendous increase in air traffic volume. During the past year or so we have seen three basic approaches emerge designed to increase load factors and revenues by reducing fares.

First, we have the so-called coach service offered at off-hours by the scheduled carriers, and at more convenient hours by the irregular carriers at approximately four cents per mile compared to the standard six-cent fare. Second, the inauguration of the family plan system wherein reduced rates are made available on off-days during the week; and third, the excursion fares offered to points by various scheduled carriers during the off-seasons.

No matter how you view these proposals, they all simmer down to reducing fares as an inducement to the public to use air transportation so that the carriers might build higher load factors, increase utilization of equipment and augment their badly needed revenues. Of the three, no one will deny the fact that air coach service has had the most spectacular effect on the development of real mass air transportation.

For some months non-scheduled operations have been conducted by the so-called irregular carriers at reduced rates between main traffic points, such as San Francisco to New York, Los Angeles to New York, New York to Miami, and Puerto Rico to New York. In each instance, the public responded with enthusiasm.

In September 1948, Pan American Airways was the first scheduled carrier to increase seating capacity, remove some of the frills and inaugurate the coach type service between Puerto Rico and New York. They reduced the one-way fare from $100 to $75 in order to compete with the non-scheduled carriers who were carrying hundreds and hundreds of passengers between these two points. The phenomenal success of Pan American can be best illustrated by referring to its operations in the first quarter of 1948, when it was operating a deluxe service only. At that time it carried 4,360 first-class passengers between New York and San Juan. During the first quarter of 1949, it carried 7,399 first class passengers and in addition 10,984 coach passengers. The record shows there was little diversion of first-class passengers to the coach service. A new market of mass air transportation was opened up, and for the first time was exploited by an established competent operator.

A "wait and see" attitude had been adopted by the domestic carriers until Capital Airlines, in November 1948, with the approval of CAB, inaugurated a New York-Chicago coach service. It proved to be an immediate success in spite of the fact that this service was available only in the inconvenient early morning hours. The customary lack of travel between midnight and 7 A.M. requires facilities and planes to remain idle, and idle plants and planes eat profits. The fare between those two cities for this early morning travel was reduced from $44.10 to $29.60. The development of the traffic was spectacular, as were the load factors. In the entire year 1948, Capital Airlines carried only 1,002 passengers in its regular first-class service between Chicago and New York, while in the month of December 1948 alone, the second month of its coach service operations, it carried three times as many passengers, or 3,072 in aircoach service. In the first four months of

1949 Capital carried 10,242 air coach passengers. Again the growth was not at the expense of its regular scheduled service; in fact it had exactly the contrary effect. It helped strengthen the first-class service.

Northwest's air coach experiment has enjoyed the same phenomenal success and has averaged 80 percent load factors on some of its coach flights. Mr. Hunter, its President, testified the air coach passengers come from "an entirely different market; they look different, they come out to the airport differently, they come out to the airport with their own lunches, you see the bananas and orange peels that you see in tourist coaches." Northwest contends that its surveys indicate that 40 percent of its air coach passengers would not have traveled by air if it were not for the low fares. Similar statements have been made with even higher percentages by practically every non-scheduled operator who has appeared before our Committee.

The CAB still regards coach service as a limited experiment and permits it to be conducted only to *evaluate* its soundness. It has limited the scope of the experiment so as not to lead to a general breakdown of the fare structure of the regular service. *Low coach service to date has been approved by them for only six carriers. While the Board is slowly accumulating data for evaluation, there are definite signs that this is one way of immediately opening up a new class of air traffic.*

Air Freight Service

While it cannot be denied that air freight has a real place in the field of air transportation, practically every certificated carrier appearing before our Committee roundly and caustically criticised the recent action of the CAB in tentatively certificating four all-cargo carriers. The question is whether the potential is sufficient to warrant the certification of specialized freight carriers at the possible expense of the present certificated carriers in that field.

Severe criticism has been directed toward the certificated carriers for failure to develop the air freight business after the war. The amount of freight carried by them before the independent cargo carriers entered the field was negligible. Whatever the reason, the total tonnage carried was small. The keen competition between the independents and the certificated carriers has increased the volume of freight tremendously. In 1946, 16 certificated carriers transported approximately 18 million ton-miles of cargo. while the non-certificated carriers transpoted 25 million tons. But in 1948, the certificated carriers transported 70 million ton-miles, while the non-certificated carriers, which had decreased in number, handled only 48 million. This, however, is only a small fraction of the recognized potential.

During this period the non-certificated freight carriers have lost millions of dollars; nevertheless, while the CAB has tentatively certificated four all-cargo carriers to operate the Board made it a vital part of the proposed franchise that the operation would be without mail pay. We, in Congress, are very much interested in the decision by the Board, and particularly the opinion wherein it states that no mail pay is to be given to the tentatively certificated cargo carriers.

Air Mail Pay

During the past three years Federal appropriations for mail pay have been increasing and numerous questions have been asked as to why, during this period of unprecedented prosperity, airlines should require additional mail pay, when there was no substantial increase in the volume of mail carried. In 1946, the total mail pay for domestic and international carriers was $42,967,000; in 1947, it was $69,489,000; in 1948, it was $111,521,000;

and in 1949, it is expected to reach the huge total of $125,000,000. Clearly the CAB is underwriting the airline commercial losses with mail pay. No one knows how much of these payments are subsidy and how much is compensatory.

Last January some airline officials took the position that there is nothing wrong with the industry, which bigger and better mail pay will not cure. During the hearings, a few airline presidents accused the United States Government of bad faith because their mail pay was being held to a minimum. However, many airline presidents urged that compensatory mail pay be separated from subsidy to create an incentive to all airlines to get on a self-supporting basis, and to remove the stigma of subsidy from the airlines which are now earning every cent of their mail pay, and quite a few are earning every cent paid them. It is my considered view that to mix mail pay with subsidy is a sloppy and wasteful way to do business. The CAB should recognize the element of abuse inherent in it and correct it. *Naturally, the privilege of awarding mail pay without specific standards and without limitation gives CAB a lot of power over the airlines which it might well like to retain.*

With greater commercial business of all kinds since the war, the trend towards increased financial dependence upon government support in mail payments, airport facilities, and navigation aids, is one of the basic paradoxes that has given rise to the investigation we are now conducting. On its face there would appear to be something radically wrong with airline management, the CAB, or the statutory provisions for promoting air transportation.

It seems to me that if we are to find out if the airlines are a "subsidy ridden industry devoid of incentive to be commercially successful"—which they vigorously deny—*the first thing to do is to find out the fair compensation that should be paid for the services rendered and how much subsidy is now being paid, and for precisely what it is being paid.*

Capt. Rickenbacker of Eastern and C. R. Smith of American have proclaimed that the present method of meeting the carrier's need through air mail payments penalizes the efficient carriers. C. R. Smith put it this way to the committee:

> "The complete lack of standards in payment for the transportation of mail obviously represents a discouraging situation to the efficient operation. One company transports mail between two terminal points, with modern equipment and adequate schedules. Another company operates along the same route, serving the same terminal points, but providing a mail service of substantially less utility than the first. But the second of the operators receives two to ten times as much as the first operator for transporting a pound or ton of mail between the two identical points. And not only that, if the first operator finds a way of reducing his cost, he is quite apt to have his rate reduced. He may, at the same time, find the rate of his competitor increased by reason of greater 'need' for additional mail compensation.
>
> "I know of no system which will produce less incentive, or act so much as a drag on the exercise of the highest degree of management ability. Often, rather than an incentive to do your best, the present system of mail payment seems to offer reward for lack of result."

There is much merit in this position, and much to be said for the establishment of mail rates which will provide identical rates for the performance of identical services, provided, of course, the services performed by any two carriers can be identical.

Since the war, the method provided in the Civil Aeronautics Act of determining air mail payments for future periods seems to have broken down, and the Board has resorted to the establishment of temporary rates,

which place the carriers on "cost-plus"—a basis never contemplated by the framers of the Civil Aeronautics Act.

I am of the opinion that it is very important to arrive at the amount of subsidy in some acceptable manner in the near future and if the CAB cannot or will not do so, it will be necessary for the Senate Committee on Interstate and Foreign Commerce to make such a determination.

Congress should do what it can to point the way to a healthy and self-sufficient network of aggressive airlines adapted to the present and future needs of the commerce, the postal service, and the national defense. In directing the CAB to encourage the development of commercial aviation, the Civil Aeronautics Act has not differentiated among these three cardinal objectives. Clearly these are three distinct national interest objectives, and they should be differentiated for the purpose of determining the amount of the payments made.

While it is true that none of the three objectives are susceptible to valuation in terms of dollars, nevertheless, a reasonably acceptable approximation can be reached. It is my belief that if the national defense of the country makes it advisable to augment civil aviation facilities beyond their natural economic level, then this objective should be recognized as a cost to be attached to the military budget. *Sound national bookkeeping requires that the expenditure of public funds for the Postal Service, the National Defense, and commercial transportation services should all be specifically labelled as such,* and no longer be wrapped up in one package and called mail pay.

In classifying the support to be given the certificated carriers, we have four distinct groups with four distinct sets of problems:

FIRST. The Big Four: American, United, TWA and Eastern. They receive identical compensation for the transportation of mail which the Civil Aeronautics Board deems to be a "service rate." The Big Four contend there is no subsidy in this "service rate," although early in 1949, three of them received additional retroactive payments which made their corporate balance sheets much more attractive.

SECOND. The Regional Carriers, into which classification fall the rest of the intermediate and small trunk line carriers, are known as "need carriers." There is no uniformity in the "need rate" paid to these carriers for the transportation of mail as the rate is based on the anticipated deficits from their commercial revenue over their anticipated allowed expenses based on their past operating record.

THIRD. The Feeder Lines. Twenty-one of these local and feeder carriers have been certificated by the Board for a three-year experimental period. The objective of the Board in creating the local carriers was to provide adequate air service to the local communities throughout the country. Nonetheless, their dependence upon the Government has been considerable and now their mail pay bill is approaching $15,000,000 annually. When and if all of them get under operation, their payments may exceed $23,000,000.

FOURTH. International Air Carriers. The problems of this class of carrier differ from that of domestic carriers because of our national interest abroad. Previous to World War II, only one U.S. Flag Line (Pan American) operated overseas. Today there are twelve U.S. Flag Lines in international air carriage, exclusive of at least seven additional non-certificated carriers operating under temporary "specific exemption," issued by the Board.

Superimposed on these four types of certificated carriers are the irregular and contract carriers, and the cargo carriers recently tentatively granted temporary certification without mail pay.

I am gratified, of course, that the CAB has announced that it will undertake "a detailed examination of the cost to the carriers of handling the mail for use in determining compensatory rates and of the factors which enter into the determination of fair compensation for carrying the mail." This intent was announced in the Board's Statement of Economic Program

for 1949, and I certainly hope that it was not just another New Year's resolution.

Some carriers have testified that the cost of rendering service to many of the smaller non-profitable points has caused their losses, which service, if discontinued, would put their whole system in the black. For example, one carrier serves 38 small cities on its system. Those 38 cities provide the carrier with 8% of its total revenue. For serving those 38 small cities the carrier receives $20,000 a month in mail pay. The carrier claims that if it could discontinue service to those 38 cities it would save $4,000,000 a year for the company.

The argument contained in the foregoing example is a logical one. However, this company petitioned the Board for the right to serve these cities, and it convinced the Board that these points should have service. The Board did not arbitrarily say to this company "you serve these points." This problem of overexpansion of route systems and service to non-profitable points is not solely the Board's fault; the carriers share the responsibility for wanting to be certificated to serve every community in sight before a possible competitor got there. Expectations of receiving generous mail pay for such operations may have contributed some incentive.

CAB Delays and Expense

In April I made a report to the United States Senate on communications in which I criticised the Federal Communications Commission by stating:

> "Through the Commission's failure to make decisions, great harm has been done, not only to individuals, but to whole communities . . . in many instances, failure to take any action is far more deadly and disastrous than an adverse action might be. When pending matters are delayed year after year the Commission's victims are tied up without recourse. They can make no plans for the future and they cannot go to the courts for relief."

To a great degree this same condition appears to prevail in the Civil Aeronautics Board. For instance, at the present time the eyes of the entire industry are focused on the Air Freight Case. A pre-hearing conference report was issued in April, 1946, and a final decision has not yet, after three years and four months, been issued. I realize that this is an important decision in which complex and complicated issues are being considered, but to wait more than three years to have an application decided is far too long.

The delays, expense, and time consumed in trying such a case can lead the average citizen into financial ruin. Mr. Slick of Slick Airways, Mr. Playford of U. S. Airlines, Mr. Prescott of the Flying Tigers Airlines and Mr. Willis of Willis Air Service have all testified that it has cost them so far between $70,000 and $100,000 each to prosecute their applications in this case. I wonder how much the A.T.A. and the certificated carriers have spent in opposing them? The responsibility for completing such policy decisions as the Air Freight Case rests with the board. *Perhaps it would be helpful to require the CAB to report to Congress the status of all applications periodically that are over six months old.*

Airline Finance

Many a ship has been wrecked on the rocks of unwise financial policy. Some of the airlines have failed to provide a balanced structure. This means maintenance at a reasonable ratio between debt financing and equity financing. Of course, it would be ideal if every corporation—airlines included—could finance itself primarily by the issuance of common stock. There would then be few fixed charges to meet, and stockholders, although disappointed,

could not reasonably demand that dividends be declared unless the company had earned them.

A year ago the composite debt-equity ratio of the sixteen so-called trunk airlines was 58 debt to 42 common stock. This is definitely too high. One airline's ratio is 95 debt to 5; another 75 debt to 25; and several others 85 debt to 15. On the other hand, a few of the trunk lines are in the fortunate position of having put their financial houses in order by the issuance and sale of adequate common stock when the market was absorbing such issues readily.

Since it is unrealistic to expect a new, unproved and rapidly growing industry like the airlines to finance themselves solely through the issuance of stock, the question arises: "What is a safe and proper ratio between long-term indebtedness and equity financing through preferred and common stock? No hard-and-fast rule can be laid down because the circumstances of the various carriers obviously differ. The concensus of informed opinion, however, condemns the use of long-term debt in any percentage greater than 50 percent of the dollar amount of the total capital structure.

The proposal has been made that all future issues of airline financing require a "no objection" report from CAB before being consummated. As might be expected, airline executives are unanimous in opposing such control. They point to the delays encountered in all their present contacts with the CAB, and predict that the vesting of control over security issuance in the Board would generate similar delays in this new field. Moreover, since the timing of security sales is all-important and market conditions fluctuate so rapidly, not only from month to month but from day to day, the inevitable delays incident to CAB approval would make future airline financing extremely slow, unpredictable and costly. Against these arguments stands the disagreeable fact that in the absence of such restraints a majority of the airlines have recently put themselves into a difficult and tight financial situation with the threat of bankruptcy just around the corner. From the standpoint of American business theory, and my own personal philosophy, I am reluctant to advocate further encroachment by government upon the domain of business management's normal functions, but *the unpleasant facts disclosed by our inquiry cause me to favor the imposition of CAB control over security issues.*

But there is another side of this problem. As a condition precedent to making a loan to an airline, the RFC now is required by law to obtain from the CAB its approval and, except for equipment loans, its certification that the borrowing airline is expected to be able to meet its fixed charges. To the average citizen this would appear to be entirely normal and proper. The CAB is a specialized aeronautical agency presumably endowed with expert knowledge concerning airline operation problems and traffic potential, including their financial requirements and the justification for borrowing additional funds. What more natural than that Congress should require such approval to enlighten the RFC in deciding whether or not to approve the loan and disburse the funds? The "joker" in the picture lies in the apparent connection between loan approvals and mail subsidies.

The implications are obvious. Civil Aeronautics Board approval is a condition precedent to an RFC loan. By law CAB has both the power and the duty to set air mail rates at figures high enough to cover the reasonable expense of airline operation under economic and efficient management. Interest on indebtedness, whether incurred through a bank or through RFC, is a legitimate item of expense, as is the gradual amortization and repayment of the principal of such a loan. Can we honestly expect the RFC—realistic and hard-headed bankers evaluating the loan application of an

airline—not to be governed by the fact that the CAB through air mail payments can fix rates sufficiently high to service and amortize any loan, even though such loan be economically unjustifiable?

In the light of these facts, can we avoid the question, *has the CAB committed itself, in approving an airline's loan application to the RFC, to see that air mail rates are fixed at a sufficiently profitable level to assure the repayment of the loan?* This is a grave question. The RFC has more than 70 million dollars of airline and airline equipment loan applications (or conversations preliminary to loan applications) now pending. This whole financing and refinancing problem could become quite serious.

SAFETY

The principal deterrent to air travel is the public's belief that it is not sufficiently safe; and the next most important deterrent is that airlines are not sufficiently punctual and reliable in meeting their schedules.

It is always annoying and sometimes disastrous for a prospective passenger to find that the scheduled flight, around which he has constructed important travel plans, has been cancelled. In 1948 a total of 11,400,000 scheduled flight miles were cancelled by domestic trunk lines. Seventy-three percent of these were cancelled in the five winter months. Lines flying northern routes are particularly vulnerable. During January 1948, one airline was forced to cancel over 26% of its scheduled mileage. On that line the odds were only 3 to 1 that a passenger during that month would have been able to complete his contemplated flight. Modern business organizations run on a tight time schedule. Unless the airlines can meet the demand for reliability of schedules they cannot hope to serve their maximum market, particularly among business travelers. A few disrupting cancellation experiences are sufficient to make many existing and potential customers change their minds in favor of the comparative reliability of railroad schedules.

Much is being done to improve regularity and safety. By far the most important attack is being sponsored by the Civil Aeronautics Administration. This is the technical safety program worked out by the Radio Technical Commission for Aviation, and known as the SC-31 program. In addition to the instrument landing system (ILS), ground controlled approach system (GCA), and precision beam radar, this expert Committee recommended the universal adoption of three new technical devices, in order to increase the reliability and safety of aircraft operations.

ONE. *The Omni-directional range, or omnirange.* This device enables the pilot to fly by eye instead of by ear. He holds his course by watching the movement of an indicating needle on his instrument panel.

TWO. *Distance measuring equipment (DME).* This equipment will enable the pilot to read directly on his DME dial the exact distance in miles to or from the omnirange to which his instrument is tuned.

THREE. *Course line computer.* This device makes it unnecessary for the pilot to fly straight toward or directly away from the omni-range. Instead he can fly a straight course between any two selected points.

In 1948, the domestic airlines operated at a net loss of $20,702,000 prior to receiving increased retroactive mail pay. *Had the SC-31 program been functioning, even in its transitional state, the Civil Aeronautics Administration estimates that the airlines would have broken even in* 1948! No one can estimate the tremendous boost air travel will receive when these devices make air travel safe and dependable. It is encouraging and significant that in spite of the recent airline tragedies among the independent and foreign carriers, no major domestic certificated airline has had a fatal crash during the past 10 months. *Eventually air travel is likely to be the safest method of all travel.* For us in Congress, that is our hope.

Federal Airport Program

In 1946, Congress enacted a statute establishing a National Airport Plan for the construction or improvement of civil airports throughout the country over a period of seven years, on a matching funds basis involving an aggregate seven-year federal expenditure of five hundred million dollars. This program is well under way. These civil airports are being constructed according to the most modern plans and specifications. Including airports constructed under this program, the total number of civilian airports in this country today is approximately 6,000. A great majority of them have short runways, however, and can handle only small planes. Only about 1,000 can handle planes the size of the DC-3 or larger. Cities and towns have shown a commendable willingness to provide their share of the funds necessary to match the federal funds appropriated by Congress. . . .

Revamping the Air Route Pattern

One of the more important questions which the Board and our Committee will have to weigh is the reconstruction for revamping of the present very unsatisfactory air route pattern of this country. The domestic air route pattern has grown up like Topsy, without much rhyme or reason. It gives the impression that neither the domestic air route pattern as a whole, nor the individual systems of the 16 trunk carriers, shows evidence of a well-planned, orderly airline system designed to fit into a balanced overall transportation network.

The duplication and triplication of competing air service over many routes has led, in the opinion of such industry leaders as C. R. Smith and Eddie Rickenbacker, to "wasteful competition and low load factors and in substantial and continuing operating losses" and has left the country "with a pattern of routes and services which cannot be supported on a self-sustaining basis by the existing or probable volume of traffic."

Throughout the growth of the airline industry, *the CAB has had neither format nor conception of a national route structure which would generally prove to be economically sound for carriers to operate.* I believe that all business, whether it be strictly private enterprise or under government regulation, should anticipate the future with well-considered planning. *There is no excuse for failure to plan in an industry which grows and expands by permission of a government agency.*

Some of the trouble may be due to the illogical "grandfather" routes, which Congress perpetuated in 1938, but since the Civil Aeronautics Act, the Board has doubled the certificated domestic air routes and has greatly increased point-to-point competition. The criticism, however, cannot be dismissed that the illogical route pattern is due in part to the case-by-case method and to changing personal philosophies of CAB membership, the hotly contested struggle for new routes and "guaranteed" mail subsidies, the over-optimistic traffic and cost estimates on the part of the Government and industry alike, and last, the absence of clear standards as to what kind of an air transportation system the Congress really wanted the CAB to promote.

Our Senate Committee has been told by a segment of the industry that a route moratorium is desirable. Some of the Big Four carriers have advocated this and there would probably be unanimity in this view among the Big Four, if Eastern Air Lines did not have an application pending before the Board for an extension to the West Coast. It appears that Regional Carriers are opposed to a route moratorium. They desire to tie up loose ends of their route systems with extensions and new routes into areas where the grass looks greener. It is their ambition to grow bigger.

In the feeder experiment, it is too early to make an evaluation along this line, although one feeder certificate has been terminated and another threatened. It is not surprising to find these operators petitioning the Board for case-by-case route adjustments and extensions. *It is my hope that the CAB will adopt an overall policy in determining the extent to which the feeder line service is to be continued.*

AIRLINE CONSOLIDATION

Many witnesses coming before our Committee say there are too many airlines and that many of the illogical conditions in the domestic route pattern can be cured by merger or consolidation of carriers and by the elimination or transfer of separate routes and points. Reconstruction of the present domestic route pattern is both important and urgent.

Witnesses have told the Committee that over certain segments of their route system there is too much competition; that the CAB has certificated too many lines to operate between certain points or areas; that if one carrier is eliminated, the one or more remaining carriers could conduct a profitable operation and provide adequate service. *If we have excessive competition it is because the CAB authorized this competition and after once authorizing it, even though they may have erred in judgment, the situation remains to be corrected.* An airline losing money under these conditions is not too concerned because such losses are generally considered in the computation of the carrier's mail rate.

Following his appearance as a witness, Captain Eddie Rickenbacker of Eastern Airlines made a sweeping proposal to me in a letter. He magnanimously offered to take over the entire domestic systems of five carriers operating east of the Mississippi and competing generally with Eastern, and stated he would render the same quantity of mail and passenger service presently offered, and do so without mail subsidy payments, at an estimated saving to the taxpayer of over $10 million annually. This touched off shouts of monopoly, and counter proposals by the lines which would be gobbled up.

A more fundamental question to be considered is to what extent regional monopolies such as Captain Rickenbacker suggests, can be encouraged without undue sacrifice of the quantity and quality of service obtained through competition. One must consider whether competition should be restricted to large traffic terminals which can be operated without subsidy. Before any of these decisions can be made we need to know what routes are now being subsidized and the economic potential of each route segment. *A major problem will be to determine whether a reduction in the number of individual carriers, or the transfer and elimination of specific route segments will preserve the necessary quality, service and schedules, and at the same time produce a more nearly self-sufficient system.* Not without reason, Captain Rickenbacker contends, "competition which requires subsidy is wholly unjustified."

Changed economic conditions in the industry and now long-range flight equipment dictate drastic route pattern changes. However, before we can expect to bring substantial order out of chaos through mergers, consolidation and route transfers, it is clear that *the Congress, as well as the Board, may have to give consideration to the fundamental objectives to be achieved, and the means to be used to induce carriers to transfer routes, and to merge or consolidate on reasonable terms and in the best interest of the public.* In any event, I believe action along this line is needed now. *I urge airline management to consider carefully possible mergers, and hope that I personally may hear more of industry thinking on this important question.*

Related to this, consideration must be given the possibility of improving the revenue-expense ratio of carrier systems by increasing traffic density through various means such as:

(a) Elimination of uneconomical parallel competition.
(b) Elimination of notably uneconomical intermediate stations.
(c) Revision of company route patterns so as to promote more advantageous scheduling.
(d) Elimination of stations located at uneconomical distances from traffic centers.

The Committee expects to go into these problems in the course of its inquiry. It had hoped to receive substantial help from the Civil Aeronautics Board. More than a year ago, pursuant to recommendations of the President's Air Policy Commission and the Joint Congressional Aviation Policy Board, the Civil Aeronautics Board undertook an exhaustive study of competition and the existing route pattern which was expected to indicate the inherent weaknesses of the present route pattern and point the way to its correction. In its statement of an Economic Program for 1949, the Board stated that it expected this study would be available July 1, 1949, but I have been advised by the Chairman that we must expect further indefinite delay. In the meantime, the serious faults in the present air route structure demand correction and this Committee intends to find a way to accomplish it—this must be done if the unsatisfactory financial situation of many individual carriers and their mounting dependence upon Government financial support is to be remedied.

Furthermore, it is of the utmost importance for the Board to use all its economic and judicial wisdom in considering all factors in the granting of international routes because of the effect on our national interest. Whether we have too many U. S. flag international carriers is a problem currently being studied by the Board in the PAA-AOA merger case.

Public Utility or Free Enterprise

Congress ought to make up its mind whether the airlines are to be a regulated public utility or live under the cruel law of the survival of the fittest. Today airlines are neither beast nor fowl and therefore receive support from the Public Treasury to insure competition in certain specific areas. I find keen cutthroat competition everywhere-shown by excessive scheduling, luxurious passenger "extras," and extravagant promotional advertising of all kinds. To me excessive competition purchased with federal funds is ridiculous. It seems to me *the present "Dr. Jekyll and Mr. Hyde" arrangement of Federal support with "limited competition" must be re-examined.* I am impressed with this statement of Juan Trippe, President of Pan American Airways:

> "As I see it, the Congress and the Civil Aeronautics Board must make up their minds whether or not they want to return the airline industry to its intended status as a regulated public utility. If they don't, the relevant provisions of the Civil Aeronautics Act of 1938 should be eliminated. The airlines, as unregulated businesses, would then be free to operate where business was good and to abandon service where business was bad. They would be free to make high profits or go bankrupt, as the case might be."

I have grave doubts whether the airlines can consistently resist the temptation to buy greater flight capacity at a rate faster than the commercial demand will absorb as long as the CAB is virtually obliged to cover the losses by mail pay arising from management's well-meaning optimism.

Either the industry must submit to full Government regulation with less competition or run the risk of financial failure resulting from its own mis-

takes. At the same time a way must be found to provide adequate air service to local and intermediate cities that will benefit and can reasonably support air service.

CONCLUSION

During this post-war crisis in the air transportation industry there have been plenty of justifiable criticisms of the airlines, the Civil Aeronautics Board, and the Congress. The carriers have been accused of over-expansion and inadequate cost controls, while the Board has been denounced for being too quick to authorize competitive services and too slow in determining the mail rates. The Congress has been blamed for not giving the Board sufficient guidance, power, or funds to do a job that has been too big for a comparatively small staff.

But the picture grows brighter. The airlines, more and more, are getting down to earth in their operations and planning. The Board has been functioning more proficiently, and has announced an aggressive economic program for 1949, which seems to forecast a progressive approach to some of the fundamental problems.

The air services of the United States have come a very long way since TWA made its first transcontinental flight twenty years ago, and there are tremendous opportunities ahead for further growth and improved public service. It would be impossible to try to define the limits of future expansion. But I can tell you that Congress is awake to its responsibilities as part of the three horse team, responsible for the quality and quantity of American civil aviation. *Congress will do its best to help the Civil Aeronautics Board provide wise regulation. The rest, the heavy part of the load, rests squarely on the broad shoulders of the airline industry itself.*

There are far more problems than answers. Nevertheless, I repeat, the airline industry, the CAB, and the CAA, and the Congress must cooperate in solving them. As Chairman of the Interstate and Foreign Commerce Committee, I want to do my full part toward this end without fear or favor, and with only the public interest in mind. I am confident that, working as a team, we can make American aviation safe, certain, and solvent.

UNITED STATES INDUSTRY VIEWS ON ICAO TECHNICAL STANDARDS

In light of the continuing interest in the International Civil Aviation Organization which has been demonstrated by United States government officials, carrier executives, manufacturers and other air transport specialists, the Editors of the JOURNAL *believe that publication of the following letter and report adopted by the Industry Advisory Panel of the Air Coordinating Committee at its July* 11, 1949 *meeting may encourage constructive discussion and thinking on these important problems. This criticism of official policy may be significant in that it was voiced by accredited spokesmen for three major aviation groups, the Air Transport Association, the Aircraft Industries Association, and the Aircraft Owners and Pilots Association.*

ON April 13, 1949 J. B. Hartranft, Jr., General Manager of the Aircraft Owners and Pilots Association, wrote the Chairman of the ACC Industry Panel:

"The fundamental issue is to bring a halt to the multiplying, detailed ICAO regulations which mitigate, we believe, against the best interests of a growing American aviation needing only flexibility and inspiration; not regulation strait-jackets—international or domestic.

"An abrupt and entire change of policy with respect to promulgating ICAO regulations is essential if the interests of American aviation are not to be further harmed and hamstrung. This must be accomplished with extraordinary swiftness.

"For example, ICAO should not, in our opinion, concern itself with detailed regulations concerning how many hours a pilot must fly, or a specific requirement that he must be checked out in different types of aircraft, or the number of hours an engine may be run before overhaul. In lieu thereof, and if necessary, a general regulation should be written that aircraft are to be maintained properly and in safe condition. Pilot requirements should be handled with equal simplicity according to prevailing requirements of the member state.

"The dangerous drugging effect of detailed regulations—regardless of technical correctness or individual merit—cannot be overstated. Already there is evidence that smaller nations are taking ICAO regulations literally and that instead of accomplishing 'international standardization,' we are being drawn toward insurmountable barriers and general discouragement of international flying.

"Unfortunately, once detailed regulations under these concepts have been introduced by an American delegation (who may not infrequently be ignorant or not responsive to industry opinion), the segments of American industry vitally concerned are effectively although perhaps inadvertently trapped and unable to raise their voice in public protest since such action might torpedo their reciprocal rights with member countries and the delicate mechanisms inherent in business dealings with foreign nationals.

"Theoretically, we are told, a condition exists which permits industry opinion to seep into the thinking of the ICAO policy makers' caldron. In practice, however, we must invariably conclude that policy is set and fixed at the sub-committee level instead of at the Board level, and industry too frequently finds it has five or ten days to take exception to something which has already been ratified in Montreal. The CAB has not always been responsive to objections made by industry on these last minute or "fatal hour" occasions feeling, it appears, that since CAB staff participation prevailed during policy forming stages, that it could not or desired not to change positions after Montreal ratification.

"Frequently many important segments of industry do not learn of vital issues until they are suddenly announced as being in full effect. This was true recently, for example, in the case of the sudden abandonment through ICAO action of the phonetic system of abbreviations used for years in our Notams. Without warning, pilots nationwide are now unable to read the vital safety information which Notams provide. This change has been opposed bitterly by AOPA and we understand by other industry groups.

"These conditions allow an opportunity for pet ideas or themes of government personnel to, in effect, become the policy and American position at ICAO meetings, notwithstanding industry opinion, sometimes admittedly lost in the maze of ICAO details, which may be strongly contrary. These policies about detailed regulations, decided at subcommittee level and further incubated in Montreal amid a peculiar aura of compromise proneness, then are returned for rubber stamping by the CAB.

"We believe any impartial observer will admit that, to date at least, the die has been cast on contemporary issues concurrent with ICAO ratification and the action of the CAB is a mere confirming formality. We believe also that the apparent attitude of the State Department in desiring to purge the ICAO committee of industry participation is recognized as substantially

contributory to the general feeling of industry frustration and indignation which has so long prevailed.

"It has been sheer hypocrisy on many occasions for industry groups to recommend and achieve simplification of regulations domestically only to discover simultaneous efforts to sponsor rules of greater strictness through ICAO channels, or that over-zealous backers are carrying their live coals to Montreal to seek international backing for issues already heard and defeated domestically.

"We note with approval and commendation the warm and sympathetic assistance of government agencies recently in achieving relief from a few irksome and burdening regulations. Yet, with ICAO concerning itself with ever-increasing detailed regulation, we face the almost certain assurance of rearguing issue after issue a second time on foreign soil, even though our concern may only involve domestic application.

"Categorical elimination of all detailed ICAO regulations, including the repudiation of those already passed appears to us to be the only logical, workable solution to this utter chaos in regulations which now envelops American industry like a smothering blanket.

"The United States is paying the bill for most of the world, certainly this coupled with the fact that there are more private airplanes and private pilots in the United States than in all the rest of the countries in the world combined—times ten—indicates the need for clear thinking. The "freedom of the air" success formula of the United States dictates, in our opinion, a pattern for the rest of the world to follow. We see no necessity of compromising the domestic freedom of private flyers one iota merely to satisfy the imagined requirements of foreign delegates representing countries having no private flying or only a scattered pittance of government-subsidized flying club activities.

"We have only the greatest admiration for the loyal and hard working members who comprise the ICAO staff both here and abroad—and we know of the heartaches and multiple problems they have faced. Nothing in this letter should be construed to reflect against any such individual or group."

These matters were discussed at some length at the April 14 meeting of the Industry Panel, at which time it was decided to set up a special Subcommittee. The question of ICAO standards was treated by the Subcommittee at three meetings in April, May and June before the following report was adopted:

GENERAL CONCLUSIONS ADOPTED BY ACC INDUSTRY PANEL

Representatives joined in the common opinion that industry did not object to "International Agreements" per se, but that: ICAO has frequently promulgated detailed regulations beyond the scope desired by industry; that the trend is increasing. It is particularly noticeable in the fields of Personnel Licensing, Aircraft Airworthiness, and Aircraft Operations.

It is concluded that the U. S. will be required to retract on some major ICAO regulations which are already effective. The committee recognizes that repudiation of certain ICAO Annexes may entail problems of preliminary concern to the State Department. But this unfortunate by-product must not be permitted to become a deterrent to the rapid action needed to bring relief to the aviation industry of the U. S.

Lastly, it was felt that the intent of the Chicago convention had been exceeded in many respects and particularly in the matter of applying international standards to purely domestic operations.

ICAO rules, the subcommittee feels, should be the essence of simplicity; should cover only the fundamental subjects where air safety and convenience

require international regulation. The text and form of the international standards should be such as to be generally acceptable without major revision to existing standards. They should permit freedom of rapid change to meet new requirements.

SPECIFIC CONCLUSIONS ADOPTED BY ACC INDUSTRY PANEL

Annex 1, PERSONNEL LICENSING†: This is a classic example of unnecessary ICAO regulations. It is the opinion of industry that PEL requirements are unnecessary; that the present ICAO regulations in this respect should be rescinded and that each member nation should be relied upon to set practical personnel licensing standards.

Annex 2, RULES OF THE AIR: Complete confusion exists. Clarification and simplification of the ICAO regulations are absolutely necessary. It is the opinion of the aviation industry of the United States that Rules of the Air and Air Traffic Control procedures must be standardized throughout the world and that until these rules and procedures are standardized ICAO should, if need be, direct its entire regulatory process toward that end.

Annex 5, DIMENSIONAL STANDARDIZATION: No comment at this time except to observe that some industry objection does exist respecting current proposals.

Annex 6, OPERATION OF AIRCRAFT (*Scheduled International Air Services*): General complaint is of detailed regulations and entry of ICAO into fields of specific regulations even beyond domestic practices. This despite the fact that there is nothing in the convention that requires the adoption by ICAO of international operations standards. These are not desired by industry and this Annex should be rescinded without delay, particularly in view of its proposed effective date, January 1, 1950.

Annex 7, AIRCRAFT NATIONALITY AND REGISTRATION MARKS: The provisions of proposed Annex 7 are again too detailed and should be revised to encompass merely the principles desired to be achieved. For example: Included in the Annex are specific dimensions of the identification marks required on aircraft and the type of registration certificate (current proposal anticipates use of metal plate). New aircraft compliance date is October 1, 1949; old aircraft January 1, 1951. Aircraft in existence under U. S. registration which are not to be flown in international air traffic should be exempted fom Annex 7.

Annex 8, AIRWORTHINESS STANDARDS: Because of the U. S. efforts at Chicago, the airworthiness standards proposed for international adoption quite closely paralleled our domestic civil air regulations CAR Part 4. This U. S. position was arrived at by the CAA and CAB agencies without coordination with Industry and contrary to the recommendations of the aircraft manufacturers. Whether this arbitrary decision by the govenment agencies will result in ultimate adversities to the Industry will be determined by the extent to which the details of ICAO standards diverge from the normal trend of our domestic regulations. On the other hand, neither the manufacturers nor the airline operators believe that international airworthiness standards are of primary significance in insuring safe reliable transportation or in eliminating unfair competition among airlines. The state-of-the-art of aircraft design and development together with improvements in operation are responsible for advances in safety and reliability which, in turn, become acknowledged in the form of new regulations.

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†*Note*: Of the following Annexes, (1) through (5) are currently effective. Annex (6) becomes effective January 1, 1950, Annex (7) becomes effective October 1, 1949, Annex (8) comes into force October 1, 1949, Annex (9) becomes effective March 1, 1950. Annexes (9) through (13) are proposed Annexes.

There has been a serious lack of planning in the development of ICAO Annex 8 covering airworthiness, due to the absence of policies which should guide in determining the proper scope and relative merits of proposals advanced by each ICAO Member State. Neither have these policies been established domestically, but in the case of ICAO, the problem becomes acutely important due to the small minority of manufacturing nations as compared to airline operating nations. Due to this unbalanced "operational" interest there is a strong tendency for the ICAO airworthiness to become "desirable procurement specifications" rather than minimum safety standards. *First*, attention should therefore be devoted to the formulation of policies governing airworthiness, both domestically and internationally.

Recommendations:

1. The industry believes that the terms of the present ICAO Convention, which encompasses only international navigation, are not sufficiently adequate to justify the Annex of Airworthiness. This Annex should be recognized for the primary purposes of import and export of aircraft among Member States and it is strongly recommended that the Convention be expanded to cover this phase. Detailed arguments supporting this recommendation have previously been submitted to the ACC by the AIA.

2. At the present time ICAO Annex 8 is limited to standards and recommended practices for Transport Category A airplanes. An undue amount of time and energy has been devoted to the development of detailed airworthiness standards for other ICAO transport categories without first establishing either the need or the basis for such a series of airworthiness categories. With respect to the problem of airplane categories, our interest is limited to a passenger category and a separate cargo category both utilizing the basic airworthiness standards of Annex 8, Category A.

3. The subcommittee is opposed to *any* ICAO activity that would lead to the establishment of special airworthiness or operational standards for personal type airplanes. 4. We recommend, rather, that ICAO recognize domestic airworthiness certificates (issued by the country of manufacture) for any airplane of 5000 pounds or less with full permission for such aircraft to be exported or operated internationally. This is not considered an unreasonable request since a very high percentage of the aircraft in this classification are used for purely personal operation and the limited use for hire across international boundaries would not justify a special set of ICAO standards.

Annex 9, FACILITATION OF INTERNATIONAL AIR TRANSPORT: The Subcommittee has not attempted to consider the economics of international air travel but has restricted its present deliberations to the technical phases. (Other non-technical aspects are of interest and of some concern to the industry group and might provide a subject for future consideration.) Annex 9 was not given detailed study by the Subcommittee.

In regard to existing Annex 3, *Aviation Meteorology*, and Annex 4, *Aeronautical Maps and Charts* and the proposed Annexes regarding *Communications* (Annex 10), *Navigation Aids* (Annex 11), *Search and Rescue* (Annex 12), and *Airdrome and Ground Aids* (Annex 13), the U. S. aviation industry recognizes the value of these Annexes. It is important, however, that the views of the various segments of the U. S. aviation industry be recognized in preparing the U. S. position on these subjects and in presenting these subjects to ICAO for adoption.

ICAO should direct its energies toward encouraging the *implementation* of and/or investigation of non-implementation of the agreements reached in the final reports of the various ICAO Regional Air Navigation Meetings.

The implementation of these agreements, along with the revision of UNIFORM RULES OF THE AIR AND AIR TRAFFIC CONTROL PROCEDURES, Annex 3 on AVIATION METEOROLOGY, Annex 4 concerning AERONAUTICAL MAPS AND CHARTS and the proposed Annexes respecting COMMUNICATIONS, NAVIGATION AIDS, SEARCH AND RESCUE, AIRDROME AND GROUND AIDS are of paramount importance to international aviation and ICAO can provide an inestimable service to the U. S. aviation industry in pursuing these lines of endeavor.

At the same time ICAO *regulatory* work should be curtailed except for essential commitments on which there is industry agreement or revised as indicated in foregoing paragraphs.*

* Relevant to the same general problem is the material contributed by Mr. Alfred L. Wolf to the *Report on International Air Transport Law* submitted by the Committee on International Transportation to the Section of International and Comparative Law of the American Bar Association and printed in the current issue of the JOURNAL on pp. 344, 345.

STATE AND LOCAL

Department Editor: Madeline C. Dinu*

NASAO ACTIVITIES

FEDERAL AIRPORT FUNDS

EQUALLY important to the development of mass air transportation in the United States are both large terminal airports and a network of smaller well-located landing facilities. It is for this reason that considerable attention has been focused recently upon H.R. 4239 and S. 1284, two bills introduced during the 1st Session of this 81st Congress to amend Section 6 of the Federal Airport Act. The proposed legislation would change the present ratio of 75% state allocation and 25% discretionary funds under the Civil Aeronautics Administrator to a 60%-40% formula.

Federal officials supporting passage of these statutes have contended that the contemplated amendments will enable them to recapture from states those funds which were allocated but never utilized or committed by the state and/or municipal governments concerned. The recaptured funds would be devoted to projects needed in other states which had used up their allocated funds as well as available discretionary monies.

The National Association of State Aviation Officials has also looked into these proposals, and suggested a compromise whereby the federal government might recapture the unexpended funds without alteration of the 75%-25% ratio. In place of H.R. 4239 and S. 1284,[1] the NASAO has put forward the following draft amendment to the Federal Airport Act:

> "That Section 6 of the Federal Airport Act is amended by adding a new subsection thereto, as subsection 6(c), and reading as follows:
>
> "(c) To insure the full utilization of all funds appropriated for the purposes of this Act, whenever any part of apportionments to the several states as provided in Section 6(c) shall not have been allocated for projects in a state, and shall remain unexpended or unobligated beyond any fiscal year, they may be made available to the Administrator as part of the discretionary fund provided for in Section 6(b) and administered as set forth in subsection (2) thereof: PROVIDED, that the Administrator shall notify the Chief Executive of any state 90 days prior to the end of the fiscal year the amount of funds so to be transferred to the discretionary fund, and the date upon which such transfer would become effective."[2]

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* General Counsel to National Association of State Aviation Officials.

[1] On July 20, 1949 the Senate Interstate and Foreign Commerce Committee reported favorably (Report No. 730) on S. 1284 and on July 21 the House Interstate and Foreign Commerce Committee reported favorably (Report No. 1101) on H.R. 4239.

[2] Senate Committee Report No. 735 on S. 1284 states that the Administrator of Civil Aeronautics proposes to give the states 120 days after S. 1284 becomes law in which to set up projects to use up all or any part of previously unused grant allocations:

"In this connection, however, the committee has been assured that in administering the act as so amended the Civil Aeronautics Administration will wait at least 120 days following the enactment of this amendment before programing any portion of funds recaptured from previous apportionments, in order to give the State from which such recaptures are made an opportunity to avail itself of the amounts so recaptured. If, during that period, sponsors in those States submit additional projects for work contemplated by the current national airport plan, the Administrator is required to program them. In fact, even after that date, the States from which recaptures are made will still have a priority right

The legal question involved is whether such an amendment to Section 6 would not be in conflict with Section 5 which provides that the funds appropriated would be available to the Administrator for allocation to the states until 1953. In view of the economy program both in the federal and state governments, any attempt to withdraw funds from states under amendments proposed at this time, so that all funds appropriated are used, may pose a real constitutional problem, both as to retroactive effect and as to derogation of rights vested in the states in the Federal Airport Act as passed in 1946.

Private Flying

For the most part, state aviation officials have been directing their efforts during the past several months to ways and means of encouraging new and diversified uses of the personal aircraft. With the diminishing volume of aviation training under the G.I. Bill, attention has turned toward establishment of programs in education coordinated with the school systems throughout the country. Outstanding in scope and activity is that of the Pennsylvania Aeronautics Commission with the Pennsylvania Department of Education.

Departing again from purely legal questions, and making a comparison between surface and air transportation developments, the movement of persons and property by surface means is not largely in the hands of scheduled and non-scheduled trains and trucks, but in great part by the individually owned and operated automobile. What that type of vehicle has done for increased surface transportation, the private aircraft promises to do for air transportation. The economics of private use of aircraft is at a crucial juncture at this time. The Executive Secretary of the state aviation officials, Colonel A. B. McMullen, formerly for many years director of aeronautics in the State of Florida, and later Chief of the Airport Section of the Civil Aeronautics Administration, makes the following pointed observations:

> "What private flying needs most is an air vehicle which includes the quietness, safety, economy and utility of the present day automobile. Over one million young men and women have learned to fly during the past 10 years, airports have increased by 38% and we have been living in an era in which both national and individual incomes have reached new highs. Yet, during 1946, the first post war years with all these new pilots, more airports and favorable economic conditions, only 36,679 civil aircraft were manufactured, 1947—17,717, a decrease of 48% while 1948 witnessed another 43% drop to 6,969 and many of these remain unsold. During this same period, the sale of automobiles has steadily increased.
>
> "If we are to really develop private flying there must be a willingness to depart, if necessary, from conventional aircraft design, although universal adoption of known and proven developments such as the geared and muffled quiet engine, castered landing gear, folding wings, stall warning indicator and structural changes to make all conventional aircraft non-spinable or spin resistant, would all make these aircraft more acceptable and saleable.

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to the use of discretionary funds in the amounts recaptured, whenever there is a need for such funds and there are any funds in the discretionary fund which have not already been programed. If no such funds are currently available, a State having such a priority will have first claim on the use of subsequently appropriated discretionary funds." (Page 3.)

The "priority" referred to is created by the Senate amendment which reads:

"SECTION 2. That subsection (2) of section 6 (b) of said Act, as amended, is further amended by changing the final period to a comma and by adding at the end thereof the following new language: *'except that a priority shall be granted to projects in a State when the total allocations from the discretionary fund for projects in such State have not amounted to as much as one-fourth of the total amount of the apportionment for such State under subsection (a) of this section.'*"

"Certainly the manufacturing cost must be considered, but mass production is the surest means of reducing costs in America and there is every indication that mass production of private flying aircraft will never be reached with the present type airplane.

"Grover Loening, NACA consultant, told the Institute of Aeronautical Sciences in May: 'Present indications are that only 3,000 personal aircraft will be manufactured in 1949 compared to 6,900 in 1948, 16,000 in 1947 and 33,000 in 1946. Following this trend, the $92 million industry of 1946 will be a $9 million industry this year and a $2 million industry by 1952 . . . the only accomplishment in 15 years other than improvement in design detail and reliability, has been to raise cruising speeds 30-40 mph.'

"He listed the following specific defects in current private aircraft:

'(1) *Planes actually do not go where the individual really wants to go.* To meet the requirement . . . means almost vertical landing or take-off. The more nearly this is approached, the more places one can go . . . to land under 30 miles an hour needs only three times the lift coefficient of the existing planes that land at 50. The NACA has researched several wing sections and high lift devices which coupled with boundary layer control would enable a high lift of this character. Some are in daily use in the Armed Services—but not a single certificated commercial plane today has incorporated in it any more than the most elementary of such features.

'(2) *Inability to fly in bad weather.* One of the means of solution at hand is to endow aircraft with complete maneuverability. This essentially means that they must be endowed with the ability to stop in the air and back up. . . .

'(3) *Private planes make altogether too much noise.* A fundamental study of different muffler types has been made with a laboratory setup with controlled conditions of noise frequency and amplitude . . . the noise of take-off and of close-in flying of a private aircraft can be reduced to an acceptable level that no community can reasonably campaign against.

'(4) *Flying characteristics of private aircraft are not yet entirely foolproof.* This is true particularly as to spinning and spiral instability. With the knowledge now available on this subject, there is no excuse whatever for a new design of plane to be a bad spinner and if it is, the NACA has developed research procedure which would quickly cure it.

'(5) *The landing gear is subject to further developments of perfection.* The first is the cross wind landing ability that is obtained by castering landing gear wheels. . . .'"

The problem of adequate and accurate weather reporting for private flying, at regular intervals, was again discussed by state aviation officials at the Summer meeting held in July at Mackinac Island, Michigan. Use of volunteer assistance from pilots in the air, as well as from Civil Air Patrol units, or other individuals or groups, was suggested. From a practical standpoint, some answer must be found, for the U.S. Weather Bureau does not have the funds nor the personnel to give adequate coverage. On the other hand, the legal question of liability for wrong weather reporting in cases where reliance on such reporting has resulted in accidents with loss of life or property, must be considered, particularly where volunteer assistance is involved.

M. C. D.

JUDICIAL AND REGULATORY

Department Editor: Francis T. Crowe*

LIFE INSURANCE COVERAGE OF AIR PASSENGERS

DATA recently released on the aviation underwriting practices of 100 United States life insurance companies reveals a definitely progressive trend in the outlook of these important organizations on the safety and future of travel by air. The figures in Tables 1 and 2 reflect this development, and show in dollars and cents the extent of the vast improvement which has occurred since 1918. This is encouraging in light of the past inflexibilities reflected below.

At the end of World War I, insurance companies were faced with a continually increasing number of claims for death incurred through air travel. With no basis in experience for actuarial figures, and in fear of the danger of the new transportation, the companies almost without exception refused coverage to the air passenger in new life insurance policies. The efforts of the companies to define the risks to be excluded from coverage led to clauses varying widely in content and still more widely in judicial interpretation.[1] And when continued expansion of airline travel and steady reduction of passenger fatalities induced the companies to extend coverage to passengers on scheduled commercial flights, the clauses became even more susceptible of varying interpretations. An examination of the cases indicates that the confusion in the courts still exists, at least as regards policies issued prior to the 1940's.

The earliest risk exclusion clauses were almost uniformly to the effect that "participation in aviation" or "engaging in aviation," with the word "aeronautics" occasionally substituted for "aviation," was a risk not covered by the policy. The interpretations of these clauses, though not uniform, until about the middle 1930's held that one who rode merely as a passenger was "participating," but was not "engaging." Thus, a "participating" clause precluded recovery on the policy, while an "engaging" clause did not. "Participating" was held to mean "to have a part of"[2] and a passenger was thought to come within that definition. "Engaging" was early thought to connote more habitual activity than an occasional passenger ride, as well as indicating an occupational participation, as pilot or crewman.

But these interpretations were by no means uniformly accepted until the late 1930's. At that time the courts began to interpret even "participating" as meaning something more than the activity of a mere passenger,[3] and the cases today involving clauses with either "participating" or "engaging" quite uniformly hold for recovery by the beneficiary.[4] Those clauses that excluded "participating" or "engaging in aeronautic operations or expeditions" are even more apt to lead to recovery on the policy. The *Dyess case*,[5]

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[1] Glass, *Aeronautic Risk Exclusion in Life Insurance Contracts* 7 J. Air L. 305 (1936).

[2] *Bew v. Travelers Insurance Co.*, 95 N.J.L. 533, 112 Atl. 859 (1921).

[3] *Mutual Benefit Health & Acc. Ass'n v. Bowman*, 99 F. (2d) 856 (C.C.A. 8th 1938); *Mutual Benefit Health & Acc. Ass'n v. Moyer*, 94 F. (2d) 906 (C.C.A. 9th 1938); *Mass. Protect. Ass'n v. Bayersdorfer*, 105 F. (2d) 595 (C.C.A. 6th 1939); *Chappell v. Commercial Cas. Ins. Co.*, 120 W. Va. 262, 197 S.E. 723 (1938).

[4] *Lee v. Guardian Life Ins. Co.*, 46 N.Y.S. (2d) 241 (1944); *Funk v. New York Life Ins. Co.*, 60 N.Y.S. (2d) 349 (1946).

[5] "If a novitiate boarded an unbroken mustang, it would doubtless prove to be a hazardous event, but would not accurately be spoken of as an 'expedition'." *Equitable Life Assur. Soc. v. Dyess*, 194 Ark. 1023, 109 S.W. (2d) 1263 (1937).

decided in 1937, held that "operations" required more activity than found in a passenger, and that an "expedition" was more than just a hazardous event. Clauses limited to excluding "participating or engaging in aviation or aeronautics," and those that add the words "operations" or "expeditions," are quite uniformly interpreted in favor of the insured passenger.[6]

That unanimity ceases, however, as soon as other qualifying words are used. An early attempt to bring the mere passenger within the exclusion was the use of the words "as passenger or otherwise." That usage has caused more variance in judicial interpretation than any other. A most striking example of the divergent interpretations is afforded by two cases involving identical fact situations, *National Bank of Commerce v. New York Life Insurance Co.*[7] *and Ivy v. New York Life Insurance Co.*[8] In each case the insured was killed in a crash while flying as a fare-paying passenger on a regular airline flight. The exclusion clauses involved were substantially identical, to the effect that the benefits of the policy would not be paid for death resulting from "engaging as a passenger or otherwise in aeronautic operations." In the *National Bank* case the court held that if the clause had been only "engaging in aeronautic operations" the passenger clearly would not have been excluded. And, said the court, the passenger must first come within the general description of "engaging in — operations" before the words "as passenger or otherwise" can come into play.

A mere passenger not taking a part in the operation of the craft is not excluded and the beneficiary may recover. In the *Ivy* case the qualification was more effective. The court held that if the clause had merely excluded "engaging in operations" the insured would not have been excluded, but the use of the extra words clearly brings the passenger within the scope of the exclusion. The *Christen* case,[9] decided in a United States District Court in Illinois, involved substantially the same clause and fact situation as these two cases and the result was in line with the *Ivy* decision.

It is difficult to choose between the two opposite results reached in these cases. It seems obvious at first glance that the words "as passenger or otherwise" would be clear enough to exclude all passengers whether participating in operations or not; yet there are good arguments to support the view that such a clause means only those passengers who are actually taking some part in the operation of flying.[10] Clearly a passive passenger is in no sense operating the plane; nor would a prospective insurance buyer think of himself as "engaging in aeronautics"[11] if he were to be a mere passenger. Quite obviously, the courts have had difficulty with this. Of ten cases decided since 1936 in which the words "as passenger or otherwise" have been of major significance, five have allowed recovery and five have denied it to the beneficiary.[12]

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[6] Cases cited in notes 4, 5, 6, *supra.*

[7] *Nat'l Bank of Commerce v. New York Life Ins. Co.*, 181 Tenn. 299, 181 S.W. (2d) 151 (1944).

[8] *Ivy v. New York Life Ins. Co.*, 33 F. Supp. 841 (DC ND Ala. SD 1940).

[9] *Christen v. New York Life Ins. Co.*, 19 F. Supp. 440 (N.D. Ill. 1937).

[10] This view is strengthened by the fact that the risk is greater and more apt to be excluded where the passenger takes part in the operation, while a mere fare-paying passenger is a lesser risk. Further weight to this view is added by the fact that those companies that do extend coverage to fare-paying passengers on regular airlines do so without appreciable additional cost. *Nat'l Bank v. New York Life Ins. Co.*, 181 Tenn. 299, 181 S.W. (2d) 151 (1944).

[11] *Hartol v. Prudential Ins. Co.*, 290 N.Y. 44, 47 N.E. (2d) 687 (1943).

[12] Recovery permitted: *Hartol Products Corp. v. Prudential Ins. Co.*, 290 N.Y. 44, 47 N.E. (2d) 687 (1943); *Funk v. New York Life Ins. Co.*, 60 N.Y.S. (2d) 349 (1946); *Lee v. Guardian Life Ins. Co.*, 46 N.Y.S. (2d) 241 (1944); *Equit. Life Assur. Soc. v. Dyess*, 194 Ark. 1023, 109 S.W. (2d) 1263 (1937); Recovery denied: *Christen v. New York Life Ins. Co.*, 19 F. Supp. 440 (N.D. Ill.

In light of the decisions, it is apparent that use of the words "engaging in operations" combined with "as passenger or otherwise" makes for ambiguity. It is significant that in all five cases in which recovery has been allowed, notwithstanding the exclusion clause, the courts have relied to some extent on the doctrine than any ambiguity in an insurance contract will be construed strictly against the insurer.[13] In fact, as one writer noted in 1936,[14] this doctrine is recognized in almost all cases in which the beneficiary is allowed to recover.

Where the exclusion clause has not included any of the words that have given so much trouble, as "engaging," "participating," and "operations," "expeditions," and has been composed of words more descriptive of the status of a mere passenger,[15] the insurance companies have defended more successfully. In fact, under these exclusion clauses recovery has been precluded under some rather unusual circumstances. In the *Barringer* case,[16] involving a clause limiting liability if death "resulted from riding in any aircraft," the insured was an Army major en route as a passenger in an army plane from Puerto Rico to Trinidad. His plane flew out over the ocean and was never heard from again. In the *Rossman* case[17] a pilot of a small plane made a forced landing safely on the water 50 feet from shore. He was drowned in the cold water before he could reach shore. The clause that precluded recovery read ". . . as a result, directly, or indirectly, of travel or flight in any aircraft." In the *Richardson* case,[18] a clause that read "not liable for death . . . caused by an aerial conveyance" precluded recovery when the insured was forced to jump in his parachute when the fog bound plane in which he was a passenger ran out of gas. His parachute failed to open. Said the court, "It was the airplane that placed this unfortunate individual 3500 feet in the air."

In three other cases, the courts have denied recovery under circumstances equally removed from the flight itself. In two cases[19] the clauses were almost identical, that there would be no liability for death from "participation in aeronautics"; in the third[20] there would be no liability for death from "engaging as a passenger or otherwise in aeronautic operations." In all three cases there was indisputable evidence, eye witness accounts in two of the three cases, that the insured had gotten safely out of the airplane after forced landings on the water and that death occurred solely from drowning.

1937); *Nat'l Exchange Bank v. New York Life Ins. Co.*, 19 F. Supp. 790 (W.D. Pa. 1937); *Ivy v. New York Life Ins. Co.*, 33 F. Supp. 841 (N.D. Ala. 1940); *Reed v. Home State Life Ins. Co.*, 186 Okla. 226, 97 P. (2d) 53 (1939); *Beveridge v. Jefferson Standard Life Ins. Co.*, 120 W. Va. 256, 197 S.E. 721 (1938).

[13] 29 Am. Jur. 180, Insurance §166. "If insurer meant to exclude . . . liability, why didn't it say so plainly so that any wayfaring man, though a fool, might not be deceived thereby." *Equit. Life Assur. Soc. v. Dyess*, 194 Ark. 1023, 109 S.W. (2d) 1263 (1937).

[14] Glass, *op. cit. supra* in note 1, at 328.

[15] Not using words engaging, participating, expeditions, or operations. Replaced by clause similar to ". . . from operating, or riding in, any kind of aircraft," or ". . . service, travel or flight in any species of aircraft."

[16] *Barringer v. Prudential Ins. Co.*, 153 F. (2d) 224 (C.C.A. 3d 1946).

[17] *Rossman v. Metropolitan Life Ins. Co.*, 71 F. Supp. 592 (S.D. Me. 1947); *Accord, Green v. Mutual Benefit Life Ins. Co.*, 144 F. (2d) 55 (C.C.A. 1st 1944).

[18] *Richardson v. Iowa State Traveling Men's Ass'n*, 228 Iowa 319, 291 N.W. 408 (1940); *Accord, Knouse v. Equit. Life Ins. Co.*, 163 Kan. 213, 181 P. (2d) 310 (1947).

[19] *Neel v. Mutual Life Ins. Co.*, 131 F. (2d) 159 (C.C.A. 2d 1942); *King v. Order of United Commercial Travelers*, 65 F. Supp. 740 (W.D. S.C. 1946). The fact that in these cases the insured had been the pilot is immaterial since their activity in the plane had nothing to do with their death.

[20] *Hart v. New England Mutual Life Ins. Co.*, 1943 USAvR 38, (N.D. Cal. 1942).

Table I — Aviation Passengers* — Summary of Underwriting Practices of 100 U. S. Life Insurance Companies**

U. S. Scheduled Flights	1935 No. of Co's	1935 No. Hrs. Without Extra Premium	1935 Min. Extra Premium Per $1,000	1940 No. of Co's	1940 No. Hrs. Without Extra Premium	1940 Min. Extra Premium Per $1,000	1946 No. of Co.'s	1946 No. Hrs. Without Extra Premium	1946 Min. Extra Premium Per $1,000	1948 No. of Co's	1948 No. Hrs. Without Extra Premium	1948 Min. Extra Premium Per $1,000
Accept Standard, no limitations	6			11			81			83		
Accept standard, limit on amt. only	10			11			9			9		
Accept, limit with extra premium	36			38			7			3		
Most liberal		100	$1.00		200	$1.00		300	$2.00		300	$2.00
Most frequent		50	2.50		100	2.50		250	....		250	....
Individual consideration	38			31			3			5		
Decline or exclude air risk	10			9			0			0		
Total	100			100			100			100		
Non-Scheduled Commercial												
Accept Standard, no limitations	0			0			22			25		
Accept standard, limit on amt. only	1			2			9			10		
Accept, limit with extra premium	21			27			28			15		
Most liberal		50	$1.00		75	$1.00		100	$2.00		100	$2.00
Most frequent		10	5.00		20	2.50		50	2.50		50	2.50
Individual consideration	50			42			36			45		
Decline or exclude air risk	28			29			5			5		
Total	100			100			100			100		
Private Pleasure												
Accept Standard, no limitations	0			0			21			34		
Accept standard, limit on amt. only	1			1			9			8		
Accept, limit with extra premium	19			24			24			12		
Most liberal		90	$1.00		50	$1.00		150	$2.00		100	$2.00
Most frequent		10	5.00		20	2.50		50	....		50	2.50
Individual consideration	52			43			41			41		
Decline or exclude air risk	28			32			5			5		
Total	100			100			100			100		
Military												
Accept Standard, no limitations	0			0			5			14		
Accept standard, limit on amt. only	0			0			4			2		
Accept, limit with extra premium	4			6			9			12		
Most liberal		50	$1.00		200	$1.00		150	$2.00		200	$2.00
Most frequent		0	....		0	....		0	2.00		...	2.50
Individual consideration	61			56			61			59		
Decline or exclude air risk	35			38			21			13		
Total	100			100			100			100		

*For underwriting purposes passengers are also classified "Western Hemisphere Scheduled," "World-Wide Scheduled," "Company-Owned Business Planes."

**Selected data from tables issued by the Division of Statistics and Research of the Institute of Life Insurance in New York City in May, 1949.

Table II — Pilots and Crews — Summary of Underwriting Practices of 100 U. S. Life Insurance Companies*

U. S. Scheduled Flights	1935 No. of Co's	1935 Min. Extra Premium Per $1,000	1935 Max. Amt. Ins. Issued	1940 No. of Co's	1940 Extra Premium Per $1,000	1940 Max. Amt. Ins. Issued	1946 No. of Co's	1946 Min. Extra Premium Per $1,000	1946 Max. Amt. Ins. Issued	1948 No. of Co's	1948 Min. Extra Premium Per $1,000	1948 Max. Amt. Ins. Issued
Accept, extra premium only	5			8			51			42		
Most liberal		$25.00			$12.00			$ 2.50			$ 2.50	
Most frequent		25.00			25.00			3.00			3.00	
Accept, limit with extra premium	30			36			39			51		
Most liberal		15.00	$20,000		12.00	$20,000		2.50	$60,000		2.50	$150,000
Most frequent		25.00	10,000		25.00	10,000		3.00	25,000		3.00	25,000
Individual consideration	31			24			3			1		
Decline or exclude air risk	34			32			7			6		
Total	100			100			100			100		
Non-Scheduled Commercial												
Accept, extra premium only	3			8			45			37		
Most liberal		$25.00			$12.00			$ 2.50			$ 3.00	
Most frequent		25.00			25.00			5.00			5.00	
Accept, limit with extra premium	22			22			36			43		
Most liberal		24.00	$20,000		10.00	$20,000		3.00	$50,000		3.00	$50,000
Most frequent		25.00	10,000		25.00	5,000		5.00	10,000		5.00	25,000
Individual consideration	35			32			11			14		
Decline or exclude air risk	40			38			8			6		
Total	100			100			100			100		
Private Pleasure												
Accept, extra premium only	4			6			43			40		
Most liberal		$25.00			$10.00			$ 5.00			$ 5.00	
Most frequent		25.00			25.00			5.00			5.00	
Accept, limit with extra premium	18			23			35			46		
Most liberal		12.00	$25,000		7.50	$50,000		5.00	$50,000		5.00	$50,000
Most frequent		15.00	10,000		12.00	5,000		5.00	10,000		5.00	25,000
Individual consideration	37			33			15			8		
Decline or exclude air risk	41			38			7			6		
Total	100			100			100			100		
Military												
Accept, extra premium only	2			5			22			26		
Most liberal		$12.00			$12.00			$ 5.00			$ 5.00	
Most frequent		12.00			12.00			6.00			5.50	
Accept, limit with extra premium	22			24			27			42		
Most liberal		8.00	$50,000		7.50	$15,000		5.00	$50,000		2.50	$25,000
Most frequent		12.00	10,000		12.00	5,000		6.00	10,000		5.50	25,000
Individual consideration	36			30			28			20		
Decline or exclude air risk	40			41			23			12		
Total	100			100			100			100		

*For underwriting purposes pilots and crew are also classified "Western Hemisphere Scheduled," "World-Wide Scheduled," "Company-Owned Business Planes," "Owner Operators."

The fact that none of these three clauses includes language as wide as that in the others cited makes the result even more interesting.

A contrary result was reached in *Bull v. Sun Life Assur. Co. of Canada*,[21] where the beneficiary under a policy containing one of the more efficacious clauses, but no military exclusion clause, was allowed to recover. The insured, unharmed himself, had been shot down in his navy plane and while attempting to inflate his life raft was killed by gunfire from a strafing Jap plane. The court said "aviation may have been a contributing cause, but that did not make death an indirect result of aviation. No risk of aviation resulted in death. A risk of war resulted in death."

Of particular interest in the past few years have been decisions interpreting policies on men killed in service.[22] Generally, exclusion clauses that would have relieved the company of liability for death in civilian passenger flights were held also to preclude recovery for death on military flights. Of special significance among these cases are five in which there were no clauses excluding recovery because of military flights. This fact precludes any thought that the courts might have interpreted the aviation and the military exclusion clauses together. In fact, one policy contained an express provision, "This policy is free of conditions as to . . . military . . . service."[23] But it had an exclusion clause against liability for death from ". . . riding in any kind of aircraft. . . ." The beneficiary contended that the company was charged with knowledge that the insured might enter the military air service and be killed in military flight and that the insured was not excluded from coverage in such flight. The court held otherwise and found for the company.

There are, however, three cases[24] involving military air travel deaths where recovery has been allowed under circumstances which make them irreconcilable with the others. The *Schifter* case is in conflict with the *Durland* decision cited above. In the latter, the company had expressly stated that the policy was free from conditions as to military service, yet recovery was precluded under the aeronautical exclusion clause. In the *Schifter* case, which contained an aeronautical exclusion clause, the company had agreed by a rider on the policy that the coverage of the policy would continue ". . . regardless of those provisions which except from payment any claims arising where he has entered the armed forces of the Nation in time of war. . . ." Here the court followed the line of reasoning of the beneficiary in the *Durland* case, that the company knew the insured might go into the air force, and allowed recovery on the policy.

As a result of the tremendous increase in passenger travel on regular airlines and because of the great increase in safety, many insurance com-

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[21] *Bull v. Sun Life Assur. Co.*, 141 F. (2d) 456 (C.C.A. 7th 1944). ". . . death as result of service, travel or flight in any species of aircraft . . ."

[22] *Barringer v. Prudential Ins. Co.*, 153 F. (2d) 224 (C.C.A. 3d 1946); *Bull v. Sun Life Assur. Co.*, 141 F. (2d) 456 (C.C.A. 7th 1944); *Green v. Mutual Life Ins. Co.*, 144 F. (2d) 55 (C.C.A. 1st 1944); *Burns v. Mutual Benefit Life*, 79 F. Supp. 847 (W.D. Mich. 1948); *Hyfer v. Metropolitan Life*, 318 Mass. 175, 61 N.E. (2d) 3 (1945); *Schifter v. Commercial Travelers*, 50 N.Y.S. (2d) 376 (1944); *Quinones v. Life Cas. Ins. Co.*, 209 La. 76, 24 So. (2d) 270 (1945); *Knouse v. Equit. Life*, 163 Kan. 213, 181 P. (2d) 310 (1947); *Durland v. New York Life*, 61 N.Y.S. (2d) 700 (1946); *Conaway v. Life Ins. Co. of Va.*, 148 Ohio St. 598, 76 N.E. (2d) 284 (1947); *Richardson v. Iowa State Traveling Men's Ass'n*, 228 Iowa 319, 291 N.W. 408 (1940).

[23] *Durland v. New York Life*, 61 N.Y.S. (2d) 700 (1946).

[24] *Schifter v. Commercial Trav. Mut.*, 50 N.Y.S. (2d) 408 (1944); *Conaway v. Life Ins. Co. of Va.*, 148 *Ohio St.* 598, 76 N.E. (2d) 284 (1947); *Bull v. Sun Life Assur.*, 141 F. (2d) 456 (C.C.A. 7th 1944).

panies have begun writing their ordinary life insurance policies to cover the insured while he is a "fare-paying passenger" on a licensed, regularly scheduled airline.[25] Two recent cases have litigated the question of what is a "fare-paying passenger" under these clauses. The results are in conflict, recovery being allowed where it appears that it should be denied, and vice versa. In the *Quinones* case[26] an army officer was riding a civilian transport DC-2 type plane, used to transport army personnel and supplies. Its pilot was an army pilot. The court decided there was nothing in the policy to distinguish between military and civilian aircraft, nor between military and civilian airfields so long as they were "definitely established." And since a civilian employee riding at his employer's expense would certainly be a "fare-paying passenger" this army officer riding at the expense of his "employer" was also a "fare-paying passenger." Recovery was allowed. In the *Krause* case[27] insured was riding in a TWA plane on a pass. The regular fare was $94.03. Insured had paid an $8.00 service charge and was thenceforth treated as a passenger so far as anything pertinent to life insurance coverage was concerned. When he was killed in a crash it was held that "fare-paying passenger" meant one who had paid the legal, or full, fare. These two decisions are somewhat incongruous when the purpose of the "fare-paying passenger" qualification is recognized as being to limit liability to the safest of air transport, the certificated air carriers.

In an article dated 1936, one writer offered as the least ambiguous, most efficacious means of clearly defining the risk excluded the following clause[28]: "Death resulting directly or indirectly from service or travel while in, on, or near, as a passenger or otherwise, any vehicle or mechanical device for aerial flight or ascension." The lapse of twelve years has proven him a good prophet. In cases involving exclusion clauses similar to this the insurance companies have fared much better than in the early ones. There is this qualification to be suggested, that the use of the words ". . . as a passenger or otherwise" has not been as helpful as it would appear they might be. The elimination of the more restrictive words "engaging" and "participating," "operations" and "expeditions" has done more to clarify the limits of liability than anything else. The insurance companies still face a number of years in which they can expect claims on old policies issued at a time when those words were used, and almost without exception the courts have treated insurance contracts as subject to interpretation, not as of the day they were written, but in the light of current conditions.[29]

Probably the reluctance of insurance companies to extend coverage to air passengers was understandable to begin with. The fatality rate as late as 1930 was 28.6 per 100,000,000 passenger miles,[30] far above that of other transportation. To cover such passengers might have required a premium increase in ordinary life insurance policies that would have made their sale difficult. But by 1935 the rate had dropped amazingly to 4.8 per 100,000,000

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[25] One of the most common clauses is "from operating, or riding in, any kind of aircraft except as a fare-paying passenger in a licensed passenger aircraft operated by a licensed pilot on a regular passenger route between definitely established airports."

[26] *Quinones v. Life & Cas. Ins.*, 209 La. 76, 24 So. (2d) 270 (1945).

[27] *Krause v. Pacific Mut. Life Ins. Co.*, 141 Nebr. 844, 5 N.W. (2d) 229 (1942). *Cf. Burns v. Mut. Ben. Life*, 79 F. Supp. 847 (W.D. Mich. 1948).

[28] Glass, *op. cit. supra* in note 1, 305, 583.

[29] *Id.* at 333. *Mass. Protect. Ass'n v. Bayersdorfer*, 105 F. (2d) 595 (C.C.A. 6th 1939); *Marks v. Mut. Life Ins.*, 96 F. (2d) 267 (C.C.A. 9th 1838); *King v. Equit. Life Assur. Soc.*, 232 Iowa 541, 5 N.W. (2d) 845 (1942).

[30] Kelly, *Aviation and Insurance*, Address to The International Claim Ass'n at Chateau Frontenac, Quebec, Canada, p. 2 (1946).

passenger miles[31] and by 1945 to 2.14 per 100,000,000.[32] Yet in 1935 only 4 companies, out of 104 questioned, extended coverage to the airline passenger in ordinary life policies, and in 1945, when passenger fatalities numbered less per passenger mile than in automobiles,[33] only 68 of those 104 companies insured airline passengers in their ordinary life policies.[34] One wonders why it is not now common practice to insure the airline passenger without exception as to travel on scheduled flights. In the eight years from 1941 through 1948 the fatality rate per passenger mile in airline travel has been lower than that of the automobile in all but two years, 1942 and 1947,[35] yet no insurance company excludes death from auto accident as an insurance risk.

It seems reasonable to suggest that scheduled air travel has attained a safety status that leaves insurance companies with no real justification for further exclusion. Indeed, granting a technical legal right to contract only for those risks they wish to cover, the insurance companies may well be said to have a public duty in this matter. The average insurance purchaser is relatively inexperienced in reading the fine print in voluminous contracts and beyond one or two obviously necessary exclusions, such as death by suicide or war risk, it appears that companies have a duty to keep the terms as simple as possible. What average man today would question, as he steps aboard a nationally known airline plane, that his family would benefit from his life insurance policy if he were killed? Let the reader ask himself if his policies would cover him as an airline passenger.

THOMAS A. MAIR*

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[31] *Ibid.*
[32] A.T.A.'s Air Transport Facts & Figures (10th Ed.), 9.
[33] *Ibid.*
[34] Kelly, *op. cit. supra* note 30, at p. 3.
[35] *Op. cit. supra* note 32. See also ACCIDENT FACTS (1948 Ed.), 77.

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* This list was prepared especially for the JOURNAL by members of the Transportation Group, Washington Chapter, Special Libraries Association under the direction of Miss Agnes A. Gautreaux, Librarian, CAA.

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